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No. _____

IN THE

Supreme Court of the United States

October Term, 1993

FAIRFAX COUNTY SCHOOL BOARD,

Petitioner,

V.

FAIRFAX COVENANT CHURCH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the First Amendment prohibit a public school system from leasing its school facilities for a church's weekly worship services, on a long-term or permanent basis, if the rental rate is so low that it saves the church hundreds of thousands of dollars a year in private housing costs.

2. If the Establishment Clause is held to permit the long-term or permanent use of public school facilities for private worship services at below-market rental rates, does this ruling resolve an issue of first impression whose resolution was not clearly foreshadowed, such that it should be applied purely prospectively, under the doctrine of *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971), to deny retroactive damage awards against public school systems that have adopted contrary policies in reliance on prior Establishment Clause authorities?

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

Petitioner Fairfax County School Board (the "School Board") was the appellee and cross-appellant in the Court of Appeals for the Fourth Circuit, and respondent Fairfax Covenant Church (the "Church") was the appellant and cross-appellee. The Church was the plaintiff in the United States District Court for the Eastern District of Virginia at Alexandria, and the School Board was the defendant.

APPLICABILITY OF 28 U.S.C. § 2403(b)

This case draws into question the constitutionality of CAL. EDUC. CODE §§ 40041(b)(3) and 40043 (West 1993 and Supp. 1994); N.Y. EDUC. LAW § 414 (McKinney 1988 & Supp. 1994); and WIS. STAT. ANN. §§ 120.12(10) and 120.13(17) (West 1991). Accordingly, 28 U.S.C. § 2403(b) may be applicable. Pursuant to Rule 29.4(c) of the Supreme Court, a copy of this Petition for Writ of Certiorari is being served upon the Attorneys General for the states of California, New York and Wisconsin. The question of the constitutionality of these statutes was not certified to them previously by the Court of Appeals for the Fourth Circuit.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

FAIRFAX COUNTY SCHOOL BOARD,

Petitioner,

v.

FAIRFAX COVENANT CHURCH,

Respondent.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 17 F.3d 703 (4th Cir. 1994) and is reprinted in the Appendix to this Petition ("Pet. App.") at 1a. The first opinion of the District Court is reported at 811 F. Supp. 1137 (E.D. Va. 1993) and is reprinted at Pet. App. 20a. The second opinion of the District Court is unreported but is reprinted at Pet. App. 31a. The opinion of the Virginia Attorney General approving Fairfax County Public Schools Regulation 8420 is reported at 1990 Report of the Va. Att'y Gen. 213, 1990 WL 511510, and is reprinted at Pet. App. 36a.

JURISDICTION

The judgment of the Court of Appeals was issued on February 28, 1994 (Pet. App. 1a). A timely petition for rehearing was denied on March 31, 1994 (Pet. App. 16a). On April 8, 1994, the Court of Appeals stayed the issuance of the mandate pending the filing of

this Petition for Writ of Certiorari (Pet. App. 18a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

This case involves the First Amendment of the United States Constitution, as made applicable to the states through the Fourteenth Amendment. The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridge the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Church challenges the constitutionality of Fairfax County Public Schools Regulation 8420. This regulation is reprinted in full at Pet. App. 59a, but provides, in pertinent part, as follows:

> Churches/religious organizations servicing Fairfax County citizens may be granted use of a school for as many as five years. Those desiring to establish a long-term use (other than one-time use) for church/religious organizations shall set up an appointment with the coordinator, community use of school facilities, for an orientation on procedures. Church/religious groups may be authorized usage after five years of use at increasing rental rates until the full commercial rates become effective in the ninth year of use. Only one church may have a contract for continuing use of a single school during any school year.

Regulation 8420(II)(G) (Pet. App. 63a).

STATEMENT OF THE CASE

The principal question in this case is whether the Establishment Clause of the First Amendment imposes any limitations on the terms under which a church may lease public school facilities for its regular Sunday worship services. The dispositive issues before the Court of Appeals were (1) whether the lease of a public school building for private worship services on a long-term or permanent basis, at a rental rate substantially below market, amounts to direct governmental support of religion in violation of this Court's Establishment Clause holdings in cases like *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), and *Tilton v. Richardson*, 403 U.S. 672 (1971); (2) whether, alternatively, this Court's decisions in *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993), require that churches be permitted to lease public school facilities on the same terms as secular community groups, regardless of the financial benefit that such use might confer; and (3) whether a decision rejecting the application of *Tilton* and *Nyquist*, and applying *Widmar* and *Lamb's Chapel*, resolved an issue of first impression whose resolution was not clearly foreshadowed such that the decision should be applied purely prospectively under the doctrine articulated in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971).

Statement of Facts

There are 149 elementary and intermediate schools and 23 high schools in Fairfax County, Virginia. These facilities traditionally have been made available for use by the public on weekends and weeknights when school is not in session. Student organizations and youth groups, parent-teacher associations, and county employee organizations are permitted to use the facilities without paying any rental fee. Cultural and civic organizations, colleges and universities, and state and federal governmental groups pay a non-commercial rate designed to reimburse the school system for the actual costs occasioned by each use of the facilities. Private organizations and businesses pay a commercial rental rate that is five times the non-commercial rate and is intended to approximate market rental fees for comparable facilities (Pet. App. 3a, 44a).

A. The History of Religious Use of School Facilities in Fairfax County.

Churches and religious organizations have also been permitted to rent school facilities in Fairfax County to conduct their weekly worship services (Pet. App. 49a-50a). Churches that need a place of worship can execute one-year renewable leases for the use of a particular school facility during the school year (Pet. App. 63a). In 1992, there were 51 churches leasing school facilities on this basis (Pet. App. 2a-3a).

Because the Establishment Clause of the First Amendment, and Article I, § 16 of the Virginia Constitution,[1] prohibit direct governmental support of religion, the school system historically has imposed use limitations on churches that have not been imposed on secular groups. During the 1970s, churches that used the schools for their regular worship services were charged the non-commercial rental rate. However, each church that desired to use a school site for longer than one year was asked to certify its progress toward the acquisition of its own building. Notwithstanding that requirement, some churches continually renewed their leases for ten years or longer. At least one religious organization candidly informed the school system that it had no plans to acquire a church of its own, and that it intended to remain in the schools instead. Pet. App. 49a-50a.

School officials became concerned that the non-commercial rental rate created a financial incentive for churches to use the facilities on a long-term or permanent basis, and they questioned whether this practice was constitutional (Pet. App. 50a). Indeed, courts in other states had held that long-term use of school facilities for religious purposes was unconstitutional, even if churches paid market rent. *E.g., Resnick v. East Brunswick Township Bd. of Educ.*, 389 A.2d 944, 953, 958 (N.J. Sup. Ct. 1978). *See* Appendix N.

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[1] Va. Const. art. I, § 16 provides, in pertinent part, that "the General Assembly shall not . . . pass any law requiring or authorizing any religious society, or the people of any district within this Commonwealth, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or for the support of any church or ministry. . . ."

In response to these concerns, the school system changed the policy in the late 1970s in order to limit church use to a maximum of five years. As churches reached this five year ceiling, however, they routinely requested, and were granted, lease extensions of anywhere from two weeks to an additional two years, as long as they represented that they were making progress toward the acquisition of their own facilities. Because this practice placed school officials in the troublesome position of having to "question a church about its private construction plans," the five year limitation was abandoned and Regulation 8420 was created. Pet. App. 50a.

B. Regulation 8420.

Regulation 8420 was first adopted in 1982 (Pet. App. 56a, 59a). This new regulation eliminated the five year limitation on church use and permitted those churches that desired to use the schools on a long-term basis to do so (Pet. App. 63a). Churches that leased public school facilities only occasionally, or on a short-term basis of up to five years, were permitted to pay the same non-commercial, cost-recovery rate as before (Pet. App. 50a). After nine years of use, churches were deemed to be in the same category as "private" users of the facilities, and were required accordingly to pay the same commercial rental rate as private users (*id.*). In the interim period between the fifth and ninth year of church use, the rental rate was increased each year until it reached the commercial rate (Pet. App. 45a, 50a). Although no legal authority in the country had sanctioned the long-term use of public facilities by churches, school officials believed that charging a market rental rate for long-term church use would obviate the concern that the school system was subsidizing or promoting religion (Pet. App. 50a).

Regulation 8420 generated little controversy over the next ten years, although the school system received complaints from the public each year that churches "should not be utilizing taxpayer facilities at all" (Pet. App. 51a). The market rate structure for long-term church users successfully eliminated the need for school officials to question churches about their private construction plans (Pet. App. 45a-46a, 50a). It also enabled school officials to explain to those citizens who complained about church use that the school system was not sponsoring or promoting religion in any way, and

that churches were required to pay for their use of the facilities (Pet. App. 51a).

C. Comparative Frequency of Use by Religious and Non-Religious Users Under Regulation 8420.

Although there were 8,500 applications for the use of school facilities in 1991, the majority of the users were student groups or youth organizations that were not required to pay any rental fee. By contrast, there have been relatively few cultural and civic groups that have rented the facilities. In the group comprised of private users, cultural and civic groups and churches, for instance, churches were the predominant users and accounted for the majority of all rentals (Pet. App. 45a).

Churches have a need for regular, weekly housing that is *sui generis* compared to the needs of non-church users. While most users submit an application on each occasion they desire to rent the facilities, a church enters into a one year lease agreement with the school system for the use of a particular school site each week for the duration of the school year (Pet. App. 45a, 63a, 79a). Between 1982 and 1992, the number of churches renting school facilities in Fairfax County ranged from 38 to 91 (Pet. App. 58a). By contrast, during the entire decade preceding this litigation, only 7 to 9 non-church users needed to rent public school facilities more than a dozen times in any given year (Pet. App. 57a).

D. Financial Benefits to Church Users.

The high cost of commercial real estate explains why so many churches seek to rent public school facilities. In 1992, for example, while in its eleventh year of use, Fairfax Covenant Church needed enough space every Sunday to accommodate 800 worshippers from 8:00 a.m. to 1:00 p.m. For this purpose, the Church executed an exclusive lease for the use of the facilities at West Springfield High School, renting an auditorium, half a gymnasium, 14 classrooms and the parking lot. The Church's main worship services were conducted in the auditorium, while other rooms were used for such things as Sunday school, day care and prayer counseling (Pet. App. 45a, 79a-80a).

The commercial rental rate under Regulation 8420 to lease this amount of space each Sunday was $1,510 (Pet. App. 46a). By contrast, the non-commercial rate for this space was one-fifth of that amount, or approximately $300.

Cost Comparison

The record was undisputed that the cost of renting comparable space for four hours at private facilities large enough to accommodate 800 worshippers ranged from $2,100 to $6,600 (Pet. App. 47a-48a).

Naturally, the cost of purchasing land and of constructing facilities comparable to those used by the Church at West Springfield High School would have been considerably greater. The minimum cost to acquire land and to build comparable facilities "would be approximately $5,832,800" (Pet. App. 54a). The cost alone of constructing the facilities and providing for design, permits, engineering and interior furnishings would be approximately $3,232,800 (Pet. App. 53a). Financing these costs over 30 years at a current interest rate of 8.5% would yield the following monthly and weekly expenses:

	Amount	Monthly	Weekly (4 weeks/ month)
Facilities & Land	$5,832,800	$44,849	$11,212
Facilities Alone	$3,233,800	$24,857	$ 6,214

In short, when the State permits an 800-member church to house itself in a public school building on a long-term basis at a cost of $300 per week, compared to the minimum $2,100 per week to rent privately, or the $11,212 per week to finance a private facility, the State relieves the church of an extraordinary expense that the church otherwise would have incurred in housing its congregation.

Course of Proceedings

In 1990, the Attorney General of Virginia specifically reviewed Regulation 8420 and approved it as "narrowly drawn to strike the constitutionally required balance between allowing the free exercise of religion and avoiding the establishment or public support thereof. . . ." 1990 Report of the Va. Att'y Gen. 213, 216 (Pet. App. 42a). The Attorney General observed that, under this Court's holding in *Widmar*, churches could not be denied access to public school facilities where the government had created a limited public forum by permitting access to other groups (Pet. App. 39a). The Attorney General went on to explain:

> The inquiry does not end there, however, because the *establishment clause* also prohibits the School Board from supporting any particular religious group. The increased rental rate imposed by Regulation 8420 is the School Board's method of attempting to avoid a level of continuing support that would violate the establishment clause . . . .
>
> . . .
>
> . . . While Regulation 8420 admittedly does not impose a similar increase on nonreligious community organizations that have met in school buildings for five years, such as scout troops or neighborhood civic associations, the use by such nonreligious groups poses no danger of an establishment clause violation.

Pet. App. 40a-41a.

The respondent, which began holding its worship services in the public schools in Fairfax County in 1980, did not file this action for injunctive relief and damages until May 1992. Jurisdiction in the District Court was based on 28 U.S.C. §§ 1331 and 1343. Ruling on cross-motions for summary judgment, the District Court held that charging a market rate to long-term church users under Regulation 8420 violated their Free Speech and Free Exercise rights, and the court permanently enjoined the School Board from charging a

higher rate to long-term church users than would be charged to civic and cultural groups (Pet. App. 29a, 34a). However, the District Court denied the Church's request for $287,000 in back-rent (Pet. App. 5a). Holding that its ruling decided a matter of first impression whose resolution was not clearly foreshadowed, that retroactive damage awards were not required to advance the purpose of the rule, and that such damage awards would be inequitable, the District Court ruled that its decision should be applied purely prospectively under the doctrine announced by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971) (Pet. App. 33a-34a).

A three-judge panel of the Court of Appeals affirmed in part and reversed in part. The panel held that charging a market rental rate to long-term church users violated the Free Speech and Free Exercise Clause, and was not required by the Establishment Clause. The panel reasoned that, under this Court's holdings in *Widmar* and *Lamb's Chapel*, the Establishment Clause is not violated when the State pays the cost of maintaining a public forum available equally for religious and non-religious discussion (Pet. App. 7a-8a, 10a). The panel also found that, with 172 schools in Fairfax County, there was no evidence that the Church's weekly use of West Springfield High School "dominated the School Board's rental capacity" (Pet. App. 9a), or that it was "interpreted by the community to constitute a religious endorsement by the School Board." Pet. App. 11a.

The panel reversed the District Court's decision to apply the ruling in this case purely prospectively. While observing that the doctrine of applying a decision "purely prospectively" survived this Court's elimination of "selective prospectivity" last term in *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510, 2517 (1993), the panel found that purely prospective treatment was not warranted in this case. Without reference to any of the many state supreme courts or attorneys general that had uniformly decided the Establishment Clause issue differently, the panel stated that "*Widmar*, a 1981 decision, unremarkably controls the decision here. . . ." (Pet. App. 13a). The panel was "not impressed" with the District Court's conclusion that retroactive application could subject the School Board to $1.1 million in rent-reimbursement claims from long-term church users, noting that the School Board had an operating budget of $850 million (*id.*). The panel also opined that the Church's claim,

and that of other claimants, would be subject to limiting defenses, such as laches and the statute of limitations, so that it would not be helpful to consider "other claimants who might benefit from the decision" (*id.*).

REASONS FOR GRANTING THE WRIT

This case lies at the crossroads of two separate First Amendment principles. The Establishment Clause strictly prohibits the government from providing financial assistance to religious institutions, whether in cash or in kind, if such assistance facilitates the practice of religion. The Free Speech Clause requires that, once public property has been opened for expressive activity by part or all of the public, the government cannot discriminate against the users of that property based on the content of their speech, unless such differential treatment is narrowly tailored to achieve a compelling state interest.

The question at the heart of this case is how to apply these principles when a church, which has been granted access to lease public school facilities along with non-religious users, seeks to use those facilities on a long-term basis as a substitute for its own house of worship. Twenty states have interpreted the Establishment Clause of the First Amendment, or their state constitutional counterparts, as placing important limitations on this practice. The Court of Appeals' ruling below appears to reject such limitations, but the decision leaves school systems without adequate direction as to what limitations, if any, apply.

I. THE DECISION BELOW CONFLICTS WITH THE LAWS OF TWENTY STATES THAT HAVE RECOGNIZED CONSTITUTIONAL LIMITATIONS ON THE USE OF PUBLIC SCHOOL FACILITIES FOR RELIGIOUS PURPOSES.

The legislatures, courts or attorneys general of twenty different states have called for various limitations on the use of public school facilities for religious purposes. The state of New York has prohibited the use of public school facilities for religious purposes alto-

gether.[2] The remaining states, by contrast, permit the use of public schools for religious purposes during non-instructional time, but they have generally prohibited long-term church use and have required that churches pay a reasonable rental fee. These authorities are collected in Appendix N to this Petition (Pet. App. 81a). A sampling of the different approaches is set forth below.

The Supreme Court of New Jersey held in *Resnick v. East Brunswick Township Board of Educ.*, 389 A.2d 944 (N.J. Sup. Ct. 1978), that *temporary* use of public schools by churches that were "diligently striving toward the procurement of their own houses of worship" was permissible, *id.* at 958, provided the schools recovered their out-of-pocket expenses occasioned by such use, *id.* at 960. The court refused to approve long-term use of school facilities for religious purposes, however, explaining that "[a]t some point, such continuous use will surely implicate the Board in the promotion of religion." *Id.* at 958. The court observed that one church's continuous rental of public school facilities for a period of five years was "approaching the outer bounds of reasonable time and nearing the point of prohibited entanglement." *Id.* at 959.

Similarly, in permitting the short-term use of public schools by several religious organizations pending the construction of their own church facilities, the Supreme Court of Florida cautioned in *Southside Estates Baptist Church v. Board of Trustees*, 115 So. 2d 697 (Fla. 1959), that "if the use of the school buildings were permitted for prolonged periods of time, absent evidence of an immediate intention on the part of the Church to construct its own building, we think it could hardly be contemplated that the public school system or its property could be employed in the permanent promotion of any particular sect or denomination." *Id.* at 700; *O'Hara v. School Bd.*, 432 So. 2d 1356, 1358 (Fla. Dist. Ct. App. 1983) (*following Southside Estates*, permitting school board to rent school facilities to church groups at cost, during non-school hours and on a temporary basis).

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[2] *See Deeper Life Christian Fellowship v. Sobol*, 948 F.2d 79, 83 (2d Cir. 1991) (holding that N.Y. EDUC. LAW § 414 would not permit the use of public school auditoriums for church worship services); *see also Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2144 & n.2 (1993) (noting that the church had not challenged the decision of the school district denying it permission to use school facilities for Sunday morning services and Sunday school, so that "the validity of this denial is not before us.").

The Supreme Court of Arizona followed *Southside Estates* in its decision in *Pratt v. Arizona Board of Regents*, 520 P.2d 514 (Ariz. 1974), authorizing Sun Devil Stadium at Arizona State University to be leased at fair market value for a series of private religious services. The Court explained that "the twin keys to the use of this stadium for the purpose stated are fair rental value and the occasional nature of the use. . . . The lease of campus facilities for occasional use, but not for fair market value, would violate the provision of our Constitution as being an appropriation or application of State property for religious purposes." *Id.* at 517.

The Supreme Courts of Iowa and Nebraska have also distinguished between long-term use of public school facilities by churches, and occasional and temporary use, ruling that only the latter could pass muster under the establishment clauses of their respective state constitutions.[3]

The Attorneys General of the states of Alaska, Arizona, California, Iowa, Maine, Mississippi, Nevada, South Carolina and Wisconsin have similarly ruled that only temporary or occasional use of public school facilities by churches is constitutionally permissible. *See* Appendix N. State statutes in California, Illinois and Wisconsin permit the use of public school facilities during non-school hours by the public, but specifically limit churches to use on a "temporary" basis.[4]

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[3] *Davis v. Boget*, 50 Iowa 11, 15-16 (1878) (holding that the use of a public school by religious groups on an occasional and temporary basis did not violate the state Establishment Clause); *State ex rel. Gilbert v. Dilley*, 145 N.W. 999, 999-1000 (Neb. 1914) (holding that the occasional use of schools for private religious purposes no more than 4 times a year for 5 years did not violate the State Establishment Clause, noting that the result would be different "if the schoolhouse had been used for religious meetings to such an extent as to make it a place of worship. . . .").

[4] CAL. EDUC. CODE § 40041(b)(3) (West 1993) (permitting use of school facilities for "[t]he conduct of religious services for temporary periods, on a one-time or renewable basis, by any church or religious organization which has no suitable meeting place for the conduct of the services. . . ."); ILL. ANN. STAT. ch. 105, para. 5/10-22.10 (Smith-Hurd 1993) (permitting temporary use of public school facilities for Sunday school and religious meetings); WIS. STAT. ANN. § 120.13(17) (West 1991) (permitting churches to use public school facilities on a temporary basis if they pay a reasonable rental fee).

The California and Wisconsin statutes are particularly instructive. California's Education Code permits churches to use public school facilities for religious purposes for "temporary periods," but only if the church itself "has no suitable meeting place. . . ." CAL. EDUC. CODE § 40041(b)(3) (West 1993). Moreover, the statute specifically requires that churches pay a rental rate that is "an amount at least equal to the district's direct costs." *Id.* § 40043(c) (West Supp. 1994). Local community groups, by contrast, are not subject to these limitations. They can be permitted to use the facilities for free, but in no event may they be charged a rental rate that exceeds the school district's direct costs. *Id.* § 40043(b). California's Attorney General recently approved these limitations, explaining that:

> [B]y charging for the direct cost for facility use, the state avoids any claim it is making an impermissible gift to religion. By limiting use to unhoused sects the government avoids permanent institutionalization of religious use within a given school facility. Such an occurrence might allow one to reasonably infer the state has placed its imprimatur on a particular religion.

California O.A.G. 52, 1993 WL 122644 (1993).

Wisconsin's statute similarly permits churches to rent public school facilities on a temporary basis, provided they pay a reasonable rental fee. WIS. STAT. ANN. § 120.13(17) (West 1991). By contrast, school boards are statutorily required to permit non-partisan and non-religious "citizen associations" to use the facilities "free of charge," and no temporary use limitation is imposed. *Id.* § 120.12(10) (West 1991).

This Court should grant certiorari to resolve the split between the decision by the Fourth Circuit below, and the prevailing legal rules in each of the twenty states listed in Appendix N.

II. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The long-term use of public school facilities by churches implicates two important Establishment Clause concerns, neither of which was adequately addressed by the Court of Appeals: whether the State is providing a financial subsidy to the practice of religion; and whether the State is placed in the position of appearing to endorse religion. Justice Brennan alluded to these issues more than 30 years ago in his concurrence in *School District of Abington Township v. Schempp*, where he observed that the Establishment Clause might permit "the allowance by government of *temporary use* of public buildings by religious organizations when their own churches have become unavailable because of a disaster or emergency," but that "[a] different problem may be presented with respect to the *regular use* of public school property for religious activities." 374 U.S. 203, 298 & n.74 (1963) (Brennan, J., concurring) (emphasis added).

The Court specifically reserved this issue in footnote 2 of *Lamb's Chapel*. 113 S. Ct. at 2144 n.2. The time is now ripe to address it.

A. The Supreme Court Needs To Determine Which of Four Rules Applies to the Use of Public School Property for Religious Purposes.

There are at least four possible rules applicable to the long-term use of public school property for private religious purposes:

(i) The Establishment Clause prohibits long-term use of public school facilities by churches;

(ii) Long-term use is permissible, but the Establishment Clause requires states to charge at least a cost-recovery rate;

(iii) Long-term use is permissible, but the Establishment Clause requires states to charge a market rate; or

(iv) The Establishment Clause is simply not implicated by the long-term use of public school facilities for religious purposes,

even if such use is permitted free of charge, so long as religious and non-religious groups are treated equally.

The Court should grant certiorari to resolve which of these rules is constitutionally compelled. To do this, the Court needs to address the following issues.

B. Does the Regular Use of Public School Facilities for Private Religious Purposes Without Adequate Consideration Unconstitutionally Advance Religion?

This Court has steadfastly maintained that direct governmental assistance to religion violates the Establishment Clause. *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) ("No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."). Indeed, the Court has specifically held that the State may not pay for the construction or maintenance of the physical buildings in which religion is taught or practiced because assistance of this sort directly benefits the religious mission of the recipient. *Tilton v. Richardson*, 403 U.S. 672, 683 (1971); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 777 (1973).

In *Tilton*, the Supreme Court upheld the constitutionality of the Higher Education Facilities Act of 1963, which permitted federal construction grants to be made to both secular and church-related colleges and universities, as long as the buildings constructed with such money were not used for religious purposes. 403 U.S. at 679-80. The Court struck down a provision of the Act, however, which eliminated this religious use restriction after 20 years, explaining that "[i]f, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion." *Id.* at 693.

The Court in *Nyquist* similarly struck down a New York state law providing for direct money grants to qualifying non-public schools, including parochial schools, for the "maintenance and repair" of their facilities and equipment. 413 U.S. at 774-80. The Court reasoned that the aid would be used to improve facilities

dedicated to *both* religious as well as secular purposes and that no safeguard could possibly prevent such aid from advancing religion. *Id.* at 779 & n.36. "New York's maintenance and repair provisions violate the Establishment Clause because their effect, *inevitably*, is to subsidize and advance the *religious* mission of sectarian schools." *Id.* at 789-80 (emphasis added).

The Court has distinguished between the provision of buildings and financial aid that promote the *religious mission* of sectarian institutions, as in *Tilton* and *Nyquist*, and the provision of *secular* aid that only incidentally or indirectly benefits the institution. Thus, the provision of police and fire protection to a religious institution does not violate the Establishment Clause.[5] Other forms of governmental aid to the *secular* aspects of a religious institution are also permitted in some cases, provided that the aid is not used for any religious purposes,[6] and provided that the recipient is not so "perva-

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[5] *E.g., Roemer v. Board of Pub. Works*, 426 U.S. 736, 747 (1976) (plurality opinion).

[6] *E.g., Bowen v. Kendrick*, 487 U.S. 589, 614 (1988) (holding that Adolescent Family Life Act, providing federal grants for services and research in the area of adolescent sexual relations and pregnancy, did not on its face violate the Establishment Clause, but remanding for examination of the constitutionality of particular applications); *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 659 (1980) (upholding state statutory scheme providing direct cash reimbursement from state funds to nonpublic schools for state-required testing and reporting, but observing that "the outcome would likely be different were there no effective means for insuring that the cash reimbursements would cover only secular services."); *Board of Educ. v. Allen*, 392 U.S. 236, 244 (1968) (upholding New York statute requiring public school authorities to lend textbooks free of charge to public and private secondary school students, since only *secular* textbooks could be provided); *but see School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 394 (1985) (invalidating state education programs financing secular classes for nonpublic school students taught by public school employees on the premises of private schools); *Wolman v. Walter*, 433 U.S. 229, 244, 247-48, 249 (1977) (upholding the provision of off-campus diagnostic and therapeutic services for parochial school students, but striking down the provision of instructional materials and equipment incapable of being diverted to religious uses); *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 480 (1973) (prohibiting state reimbursement of private schools for state required testing and record keeping costs where "no attempt is made under

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"pervasively sectarian" that aid to the secular aspects of its program "inescapably results in the direct and substantial advancement of religious activity. . . ."[7]

By contrast, "aid to a religious institution unrestricted in its potential uses, if properly attributable to the State, is 'clearly prohibited by the Establishment Clause' because it may subsidize the religious functions of that institution. . . ." *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 489 (1986) (citation omitted). Thus, "even a general welfare program may have specific applications that are constitutionally forbidden under the Establishment Clause." *Zobrest v. California Foothills School District*, 113 S. Ct. 2462, 2473 (1993) (BLACKMUN, J., joined by SOUTER, J., dissenting). "The question in each case must be whether the effect of the proffered aid is 'direct and substantial,' or indirect and incidental." *School Dist. of Grand Rapids v. Ball*, 473 U.S. at 394 (*quoting Nyquist*, 413 U.S. at 784-785 n.39).

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[6] *continued*

the statute, and no means are available, to assure that internally prepared tests are free of religious instruction."); *Lemon v. Kurtzman*, 403 U.S. 602, 619-21 (1971) (barring states from supplementing the salaries of teachers of secular subjects in private schools on the ground that policing such recipients to ensure that they do not teach religion would amount to an unconstitutional entanglement of church and state) [hereinafter *Lemon I*].

[7] *Meek v. Pittenger*, 421 U.S. 349, 366 (1975) (striking down the provision of secular maps, charts and laboratory equipment to church-related non-public schools because the "[s]ubstantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole."); *see Aguilar v. Felton*, 473 U.S. 402, 412 (1985) (holding that the use of federal funds to pay the salaries of public employees who teach secular subjects in private schools violated the Establishment Clause by creating an excessive entanglement of church and state, since the aid was provided in a "pervasively sectarian" environment, and ongoing public inspection was required to insure that no religious message was conveyed); *Roemer*, 426 U.S. at 759-60 (upholding financial assistance to church-affiliated colleges that were not "pervasively sectarian," where the statute prohibited the use of funds for "sectarian purposes"); *Hunt v. McNair*, 413 U.S. 734, 744 (1973) (upholding aid to church-affiliated college because the aid was limited to the construction of secular buildings only, the college was not "pervasively sectarian," and "every lease agreement must contain a clause forbidding religious use and another allowing inspections to enforce the agreement.").

The Court's decision last term in *Zobrest* provides a useful contrast to this case. Five justices held that it did not violate the Establishment Clause for the State to provide a sign-language interpreter to a hearing-impaired student who chose to attend a parochial school. 113 S. Ct. at 2469. Three reasons were offered for this conclusion. First, the interpreter was not provided *directly* to the parochial school, but to the student and his parents, who only then made a purely private decision that the student should attend a religious school. *Id.* at 2467. In this case, by contrast, each church tenant enters into a one year lease agreement with the school system, so that the benefit of a low rental rate is realized directly by the church.[8]

Second, the provision of an interpreter to the student in *Zobrest* created "no financial incentive for parents to choose a sectarian school" such that the interpreter's presence there could be "attributed to state decisionmaking." 113 S. Ct. at 2467. In this case, by contrast, it was undisputed that the non-commercial rental rate is

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[8] *Cf. Witters*, 474 U.S. at 488 (holding that state rehabilitation aid payments to a blind student who chooses to attend a Christian college does not unconstitutionally advance religion because "the fact that aid goes to individuals means that the decision is made by the individual, not by the State."); *Mueller v. Allen*, 463 U.S. 388, 399 (1983) (upholding Minnesota statute providing state income tax deduction for public and private school expenses for tuition, transportation and secular textbooks, noting that "by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject."); *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 676-77 (1970) (upholding tax exemption granted in all 50 states for property devoted to religious, educational or charitable purposes); *Board of Educ. v. Allen*, 392 U.S. at 244 (upholding provision of free secular textbooks, explaining that "[b]ooks are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools."); *Everson*, 330 U.S. at 17-18 (holding that the provision of free bus transportation to public and private school students aids their parents directly, and provides no direct financial benefit to parochial schools); *but see Nyquist*, 413 U.S. at 777, 791-93 (striking down state tuition reimbursement scheme for parents of private school students despite that the benefits were provided directly to the parents, rather than to the schools, noting that, unlike the property tax exemption upheld in *Walz*, there was no historical precedent for providing tax benefits to parents who send their children to parochial schools).

significantly lower than the market rate for comparable facilities, a disparity that creates an enormous financial incentive for churches to use school facilities on a long-term basis (Pet. App. 49a-50a). A reasonable observer would correctly conclude that a church that makes its home in the public schools on a long-term or permanent basis is doing so precisely because the State makes that option financially attractive.

Lastly, the *Zobrest* majority noted that providing an interpreter to a student who chooses to attend a parochial school would not relieve the religious institution "of an expense that it otherwise would have assumed in educating its students." *Id.* at 2469. In this case, by contrast, it was undisputed that long-term use of public school facilities at the non-commercial rates would relieve an 800-member church like the respondent of a monumental expense, amounting to hundreds of thousands of dollars a year. *See* Cost Comparison, *supra* at p.7. In short, the three Establishment Clause dangers that the Court found absent in *Zobrest* are starkly apparent in this case.

Of course, the State does not promote or subsidize religion every time it permits some kind of religious activity to occur in a public building. Thus, the Court in *Widmar* described as "merely 'incidental' " the benefit to college students of being able to meet on campus to discuss religion and to pray. 454 U.S. at 273; *accord Board of Educ. v. Mergens*, 496 U.S. 226, 248-53 (1990) (holding that the Establishment Clause was not violated by permitting high school students to meet during non-instructional time to discuss religion and pray). The same description was used in *Lamb's Chapel*, where a church group sought to rent a high school auditorium to show a six-part film series about parenting. 113 S. Ct. at 2148 ("Any benefit to religion or to the Church would have been no more than incidental.").

This case obviously falls somewhere in between the poles of the Court's holdings in *Widmar* and *Lamb's Chapel*, on the one hand, and *Tilton* and *Nyquist*, on the other. For when the State permits a church to lease public school facilities on a long-term basis on favorable financial terms that relieve the church of hundreds of thousands of dollars a year in housing costs, the State unquestionably confers a direct financial benefit on the church that can hardly

be described as 'merely incidental.' *E.g., Nyquist*, 413 U.S. at 756 (invalidating "maintenance and repair" grants that "made it possible for a sectarian elementary or secondary school to finance its entire 'maintenance and repair' budget from state tax-raised funds."). Concerns about this sort of assistance were foremost in the minds of the drafters of the Establishment Clause, because "[t]he imposition of taxes to pay ministers' salaries *and to build and maintain churches* and church property aroused their indignation." *Nyquist*, 413 U.S. at 777 n.33 (*quoting Everson*, 330 U.S. at 11) (emphasis added).

In determining whether this practice amounts to a financial subsidy, two questions must be answered:

1. Must Public Schools Charge a Cost-Recovery Rate to Regular Church Users?

The Court needs to determine first whether churches must pay a cost-recovery rate for their use of public school facilities. The answer to this question is easy. If the State were were not required to be reimbursed for the cost of school supplies, utilities, janitorial services, and salaries of school personnel required to be present when school facilities were used for religious purposes, this would be the most direct and obvious form of a religious subsidy. *Cf. Nyquist*, 413 U.S. at 777 ("If the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair."). Accordingly, authorities in Alaska, Arizona, California, Florida, Maine, Missouri, Nevada, New Jersey, New Mexico, Pennsylvania, Texas, Virginia, Washington and Wisconsin have all agreed that churches must pay at least a cost-recovery rate to rent school facilities for their worship services. *See* Appendix N.

The panel decision below confuses the law in this area, however, because it sends conflicting messages. On the one hand, the panel ruled that there would be no unconstitutional subsidy of religion in this case because the non-commercial rental rate "is designed to reimburse the School Board for any expense incurred by the use of the school" (Pet. App. 10a). On the other hand, the panel found that, under *Widmar*, the Establishment Clause is not offended as long as churches are given access to public facilities on "equal terms" with other groups (Pet. App. 10a). That statement not only

leaves the basis of the panel's ruling in question, but, under the latter rationale, "it takes little imagination to perceive the extent to which States might openly subsidize [religious institutions] under such a loose standard of scrutiny." *Nyquist*, 413 U.S. at 779.

Indeed, the fact that the government subsidizes secular entities has never justified subsidies to religious groups on "equal terms."[9] In fact, one member of the three-judge panel that drafted the opinion below authored another opinion two weeks later that was based precisely on this point. *See Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 18 F.3d 269 (4th Cir. 1994) (Opinion of Ervin, C.J.) (holding that it would violate the Establishment Clause for the University of Virginia to permit student activity funds to be used to defray the costs of a student-run religious publication, even though non-religious student publications received such funding).

2. Must Long-Term Church Users Pay a Market Rental Rate?

Assuming that the Establishment Clause requires that churches pay a cost-recovery rate to lease public school facilities for their weekly worship services, the second critical question is whether *long-term or permanent use* at a rent substantially below-market improperly advances religion. That inquiry involves questions of both subsidy and endorsement.

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[9] *E.g.*, *Roemer*, 426 U.S. at 747 ("The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike."); *Sloan v. Lemon*, 413 U.S. 825, 834 (1973) ("[V]alid aid to nonpublic, nonsectarian schools would provide no lever for aid to their sectarian counterparts."); *Zobrest*, 113 S. Ct. at 2473 (BLACKMUN, J., joined by SOUTER, J., dissenting) ("[E]ven a general welfare program may have specific applications that are constitutionally forbidden under the Establishment Clause."); *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 708-09 (1970) ("That is a major difference between churches on the one hand and the rest of the nonprofit organizations on the other. Government could provide or finance operas, hospitals, historical societies, and all the rest because they represent social welfare programs within the reach of the police power. In contrast, government may not provide or finance worship because of the Establishment Clause. . . .") (Douglas, J., dissenting).

a. Is a Market-Rate Necessary to Avoid Subsidizing Long-Term Religious Use of Public Facilities?

It was undisputed in this case that if the school system were to charge a cost-recovery rate to an 800-member church seeking to use school facilities as a substitute for its own, the church would be relieved of nearly $2,000 per week compared to the cost of private rental, and nearly $11,000 per week compared to the cost of private construction. *See* Cost Comparison, *supra* at p.7. When a cost-recovery rate is substantially below the prevailing market rate for private church housing, as in this case, there is an ineluctable financial incentive for churches to delay or forego building their own facilities, as happened in Fairfax County prior to the institution of the market rate structure (Pet. App. 49a-50a).[10] The government would thus be relieving the church of a significant "expense that it otherwise would have assumed" in housing itself. *Zobrest*, 113 S. Ct. at 2469.

Moreover, this Court's prior decisions strongly suggest that permitting valuable governmental property to be used for private religious services for less than fair market value is tantamount to direct financial assistance to religion. The Court in *Tilton*, for instance, endorsed a federal law that required church-related colleges that used federally funded facilities for religious purposes to forfeit damages back to the United States in an "amount equal to the proportion of its *present value* that the federal grant bore to the original cost of the facility." *Id.* at 675, 679-80 (emphasis added). This market rate approach was subsequently invoked by the Court in *Hunt v. McNair*, 413 U.S. 734 (1974), which upheld a South Carolina statute authorizing aid for the construction of secular col-

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[10] School boards in other states have had similar experiences. *E.g., Resnick v. East Brunswick Township Bd. of Educ.*, 343 A.2d 127, 131 (N.J. Super. Ct. Ch. Div. 1975) ("Religious bodies, unlike most other nonprofit organizations, maintain buildings, that is, houses of worship. The word 'church' denotes both the building and the institution. As the Nativity Evangelical Lutheran pastor conceded in testimony, a congregation which has public facilities available to it is 'off to a good start.' It can thus postpone its church or temple building program for years, a substantial credit between the nominal rental it pays and what it would have paid as rental for comparable private facilities."), *aff'd*, 366 A.2d 345 (N.J. Super. Ct. App. Div. 1976), *rev'd*, 389 A.2d 944 (N.J. Sup. Ct. 1978).

lege facilities. Although the statute was held not to violate the Establishment Clause because it prohibited the use of any state funded buildings for religious purposes, one provision of the law permitted the restriction on religious use to be lifted if the property were transferred to a purchaser at a judicial sale. 413 U.S. at 740 n.4. The Court invoked *Tilton's* discussion of fair market value in explaining why this provision was not constitutionally infirm:

> Because some other religious institution bidding for the property at a judicial sale could purchase the property only by outbidding all other prospective purchasers, there is only a speculative possibility that the absence of a use limitation would ever afford aid to religion. Even in such an event, the acquiring religious institution presumably would have had to pay the *then fair value* of the property.

413 U.S. at 744 n.6 (emphasis added).

Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464 (1982) involved a similar Establishment Clause challenge to a gratuitous transfer of surplus federal property to a religious institution. Although the majority decided the case on other grounds, Justice Brennan, joined by Justices Marshall and Blackmun, stated that "it is entirely clear from *Tilton* that if the facility is and was used for sectarian purposes, the Government was required to obtain *full market value* at the time such use commences." *Id.* at 512 n.19 (Brennan, J., dissenting) (emphasis added).

These authorities amply support the School Board's conclusion that market rent must be charged to churches that seek to use public school facilities on a long-term or permanent basis as a substitute for their own. State Attorneys General in Alaska, Arizona, Maine and Washington have reached similar conclusions, incorporating a fair rental value requirement into their policies concerning the use of public school facilities by churches. Appendix N; *see also Southside Fair Hous. Comm. v. New York City*, 928 F.2d 1336, 1348 (2d Cir. 1991) (discussing fact that sale of land to Hasidim at market value was helpful in determining whether the sale had the effect of advancing religion).

b. Is a Market-Rate Necessary to Avoid Creating the Appearance of Official Endorsement of Long-Term Religious Use?

In addition to financially subsiding religious organizations, permitting long-term or permanent use of public facilities for private worship services runs the risk of creating an appearance that the government is officially endorsing religion. In *County of Allegheny v. A.C.L.U.*, for instance, a majority of this Court held that the display of a creche for six weeks on the main staircase of the county courthouse violated the Establishment Clause, notwithstanding the fact that other sorts of displays had been permitted there in the past. 492 U.S. 573, 599-600 & n.50 (1989) (opinion of BLACKMUN, J., joined by Brennan, Marshall, STEVENS and O'CONNOR, J.J.). The Court reasoned that "[n]o viewer could reasonably think that [the creche] occupies this location without the support and approval of the government." *Id.* at 599-600.[11]

Similarly, when a church holds its weekly worship services in the same public school building week after week, year after year, the risk increases proportionately that the public will come to associate a particular church with a particular public school. The Court of Appeals failed to address this question because it analyzed the issue in terms of whether the respondent's use of one of the School Board's 172 public school facilities "dominated the School Board's rental capacity." Pet. App. 9a. Although nearly a third of the School Board's facilities were leased for religious purposes by churches in 1992, the question is not whether sufficient rental space remains for other users, but whether a reasonable observer would associate a particular church's long-term use of a particular school site as

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[11] Although the Court noted that the forum in question had not been opened for expressive activity to the same extent as the college campus in *Widmar*, 492 U.S. at 600 n.50, lower courts have found that an unconstitutional appearance of official endorsement can arise even in a designated public forum. *E.g.*, *Smith v. County of Albemarle*, 895 F.2d 953, 959-60 (4th Cir.) (holding that privately sponsored creche displayed on the front lawn of the county administrative building created an impermissible appearance of official "endorsement" of religion, despite the fact that the lawn was a designated public forum), *cert. denied*, 493 U.S. 823 (1990).

connoting official sponsorship or support. When "judged according to the standard of a 'reasonable observer,' " *County of Allegheny*, 492 U.S. at 620, a church that makes its home in the public schools on a long-term or permanent basis at a below-market rent would appear to be doing so precisely because the State makes that option financially appealing.

Many states have responded to this difficulty by barring long-term use of public school facilities by churches altogether. *See* Appendix N. The Fairfax County School Board sought instead to steer a middle course by eliminating the financial incentive that a below-market rental rate created for churches to forego private construction in favor of housing their ministries permanently in the schools. To be sure, the appearance of official endorsement that accompanies long-term or permanent use of school facilities may not be completely eliminated, because churches can still use the schools on a long-term basis. A market rate structure, however, eliminates the financial incentive to prefer public housing over private accommodations. It also permits a school board to assure those citizens opposed to the use of school property for religious purposes that the school system is "not sponsoring or promoting church use in any way, and that churches [are] required to pay for their use of the facilities." Pet. App. 51a. By accommodating church users as much as possible within the confines of the Establishment Clause, this approach significantly reduces the potential for serious political divisiveness that this Court has previously recognized as an evil associated with governmental assistance to religion.[12] *See also Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 18 F.3d 269 (4th Cir. 1994) (citing "potential for political divisiveness related to religious belief and practice" as reason for prohibiting use of student activity funds to defray the costs of a student religious publication at the University of Virginia).

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[12] *E.g.*, *Lemon*, 403 U.S. at 622-24; *Nyquist*, 413 U.S. at 794-97; *Lynch v. Donnelly*, 465 U.S. 668, 684 (1984); *Aguilar*, 473 U.S. at 416-17 (Powell, J., concurring); *Lee v. Weisman*, 112 S. Ct. 2649, 2655-56 (1992) (Opinion of KENNEDY, J.) (observing "potential for divisiveness" in school principal's choice of a rabbi to deliver prayers at a high school graduation ceremony).

III. THE COURT OF APPEALS ERRED IN APPLYING ITS RULING RETROACTIVELY.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), this Court announced a three-factor test for determining when judicial decisions may be applied prospectively:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07 (citations omitted).

Last term, a majority of this Court held that a newly announced rule of federal law must be given full retroactive effect in all civil cases if the rule was applied to the parties in the case in which it was announced, even if the propriety of applying the rule retroactively was not previously litigated. *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2517 (1993). While eliminating the doctrine of "selective prospectivity," the Court did not abandon the application of *Chevron Oil* in cases, like the present one, where the question is whether to apply the decision "purely prospectively." *See, e.g., id.* at 2524-25 (KENNEDY, J., joined by White, J., concurring); *id.* at 2528 (O'CONNOR, J., joined by REHNQUIST, C.J., dissenting) ("In any event, the question of pure prospectivity is not implicated here."). Thus, the Court of Appeals in this case properly recognized that purely prospective treatment of judicially created rules remains available (Pet. App. 13a).

The Court of Appeals erred, however, in reversing the District Court's ruling that the first and third *Chevron Oil* factors were satisfied in this case.[13] First, the panel wrongly concluded that "the holding in *Widmar*, a 1981 decision, unremarkably control[led] the decision here." Pet. App. 13a. Although the District Court acknowledged that various state courts had decided the Establishment Clause issue differently (Pet. App. 41a), the Court of Appeals' opinion did not even mention the existence of those contrary authorities. Such an omission is significant because this case is unquestionably the first in the country to uphold the *long-term* use of public schools for religious purposes, much less long-term use at substantially below-market rent.

Moreover, as the District Court acknowledged (Pet. App. 32a), finding that a decision "is controlled by" the principles articulated in a prior case is not the same as finding that the decision was "clearly foreshadowed." *E.g.*, *Florida v. Long*, 487 U.S. 223, 230-32 (1988) (holding that a 1978 decision striking down employee pension fund plans requiring unequal *contributions* from men and women, based on the generalization that women live longer than men, did not "clearly foreshadow" a 1983 decision striking down pension fund plans paying differential *benefits* to men and women based on the same gender-based assumption). A decision may announce a "new principle of law" for *Chevron Oil* purposes if the rule was "sufficiently debatable" in advance. *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1109 (1983) (O'CONNOR, J., concurring). "[T]he fact that a court says that its decision is within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a 'new rule'. . . ." *Butler v. McKellar*, 494 U.S. 407, 417 (1990). This is especially true where

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[13] The Court of Appeals did not dispute the District Court's conclusion that the second *Chevron Oil* factor would be satisfied here (Pet. App. 13a). The District Court found support for this conclusion in *American Trucking Associations v. Smith*, 496 U.S. 167, 182-83 (1990) (Opinion of O'CONNOR, J., joined by REHNQUIST, C.J., White and KENNEDY, J.J.) (reasoning that the principle of treating out-of-state truckers equally with in-state truckers did not require a retroactive tax refund). Pet. App. 33a.

the Supreme Court in the prior case "limited the holding to the fact pattern then before us." *Florida v. Long*, 487 U.S. at 231.

The *Widmar* majority did just that, stating that "[t]he basis for our decision is narrow. Having created a forum generally open to student groups, the University [may not] enforce a content-based exclusion of religious speech." *Widmar*, 454 U.S. at 277. Nothing in *Widmar* even remotely suggested that public schools, having granted access to religious groups, could permit themselves to become houses of worship on a long-term or permanent basis, much less at a rental rate that saves a church hundreds of thousands of dollars a year in housing expenses it otherwise would have incurred. As one federal district court has observed, "[t]here is no suggestion in *Widmar* that the decision should be broadly interpreted to encompass a situation similar to the one at bar in which [the church] seeks to use the school's 'public forum' policy as a basis for commencing regular and permanent church services at the [high school]." *Wallace v. Washoe County Sch. Dist.*, 701 F. Supp. 187, 191 (D. Nev. 1988). Indeed, the novelty of this issue is demonstrated by the fact that this Court only last term reserved comment on whether churches could be denied access altogether to conduct their private worship services in a public high school auditorium. *Lamb's Chapel*, 113 S. Ct. at 2144 n.2.

With respect to the third *Chevron Oil* factor, whether retroactive application would be inequitable, the Court of Appeals erred by failing to consider the financial impact that its holding will have on school boards that have regulated church use of school property in reliance on prior Establishment Clause authorities. Justice Souter recognized in his opinion in *James B. Beam Distilling Co. v. Georgia*, that the elimination of "selective prospectivity" would mean that *non-parties* would be subject to retroactive application of a new rule of law even though they might suffer greater hardship than the party in the rule-announcing decision against whom the rule was first applied. 111 S. Ct. 2439, 2448 (1991) (Opinion of SOUTER, J., joined by STEVENS, J.). In response to that concern, he suggested that, in undertaking *Chevron Oil* analysis in pure prospectivity cases, the interests of non-parties should be taken into account: "the general enquiry permits litigants to assert, and the courts to consider, the equitable and reliance interests of parties absent but similarly situated." *Id.* at 2448.

The panel below refused to consider the financial impact of a retroactive ruling. In addition to Fairfax County, which alone faces back-rent claims of $1.157 million from long-term church users (Pet. App. 57a), all other school systems in Virginia that have adopted market rate structures for long-term church users will be similarly exposed to retroactive damage awards. A retroactive holding also affects those jurisdictions that, like South Carolina, have advocated time limits on church use of public school facilities.[14] If these policies forced churches to rent privately, or to finance private construction and land acquisition, those churches can now seek to recover damages from school boards if their private housing expenses exceeded what it would have cost them to use the schools.

The prospect of such retroactive liability is precisely what animated this Court's prospectivity decision in *Lemon v. Kurtzman*, 411 U.S. 192 (1973) ("*Lemon II*"), a case relied on by the District Court (Pet. App. 32a), but not mentioned by the Court of Appeals. In *Lemon II*, this Court held that its decision in *Lemon I*, which invalidated certain forms of secular aid to parochial schools, should not be applied retroactively. *Id.* at 205-06. *Lemon I* was not "clearly foreshadowed," according to the Court, because the lower courts had been split over the legality of the secular aid scheme at issue there, and the Justices themselves were badly divided on the matter. *Id.* at 206. The Court also acknowledged "that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *Id.* (*quoting Lemon I*, 403 U.S. at 612). "[E]ven the clarity of hindsight is not persuasive that the constitutional resolution of *Lemon I* could be predicted with assurance sufficient to undermine [the State's] reliance on [the aid statute]." *Id.* at 207. The Court pointed out that government officials do not have the luxury to "stay their hands until newly enacted state programs are 'ratified' by the federal courts, or risk draconian, retrospective decrees should the legislation fall." 411 U.S. at 207-08.

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[14] *See* 1990 South Carolina O.A.G. No. 90-21, 1990 WL 482409 (Feb. 21, 1990) ("[U]nder the Establishment Clause, a school district could lawfully permit a church to use school property on Sundays provided that such usage did not conflict with school purposes and provided that the public facility was not a substitute for a permanent religious facility. . . .").

Those remarks are especially apropos of the dilemma faced by the nation's school boards in the present context. If school systems bar church access to public school facilities, or limit it to a fixed number of years, they face a *Widmar*-type access challenge under the Free Speech Clause. If they charge a below-cost or below-market rental rate to churches that seek to rent school facilities on a long-term or permanent basis, they face an Establishment Clause challenge under cases like *Tilton* and *Nyquist*. Until this Court definitively resolves the law in this area, school officials must continue to choose between one of these uncertain and financially perilous options.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

February 28, 1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 93-1334, 93-1382

FAIRFAX COVENANT CHURCH,

Plaintiff-Appellant/Cross-Appellee,

v.

FAIRFAX COUNTY SCHOOL BOARD,

Defendant-Appellee/Cross-Appellant.

On Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, District Judge.
(CA-92-743-A)

Before ERVIN, Chief Judge, and WILKINS and NIEMEYER,
Circuit Judges.

NIEMEYER, Circuit Judge:

This appeal presents the issue of whether Fairfax County School Board's Regulation 8420, which establishes rental rates for off-hour use of the county's schools, violates the First Amendment of the United States Constitution by discriminating against churches. Although the Fairfax County School Board makes the county's 172 schools generally available to community and cultural organizations for use after school hours, Regulation 8420 singles out churches for a progressively escalating rental rate to encourage them to rent elsewhere, out of a concern that any long-term church use of school property might constitute an establishment of religion in violation of the First Amendment.

The district court entered summary judgment, holding that Regulation 8420 violates the First Amendment rights of Fairfax Covenant Church, which paid the discriminatory rates, by abridging its freedom of speech and by prohibiting its free exercise of religion. The court, however, refused to impose its ruling retroactively to enable the Church to collect the "overcharges" already paid under the discriminatory rate structure. Fairfax Covenant Church has appealed the district court's refusal to apply its ruling retroactively, and the Fairfax County School Board has cross-appealed the district court's ruling that its regulation is unconstitutional. For the reasons that follow, we affirm the district court's finding that Regulation 8420 violates the Church's First Amendment rights, but we reverse the ruling which denies the Church the right to seek reimbursement for overcharges.

I

The Fairfax County School Board ("the School Board") operates 172 schools in Fairfax County, Virginia, with an annual operating budget of over $850 million. The School Board has opened its facilities to a wide array of private, community, religious and cultural organizations, both commercial and nonprofit, for use after school hours and during weekends under a rental structure adopted in Regulation 8420.

Under Regulation 8420, county, city, or town agencies, county employee and student organizations, and the Boy Scouts and Girl

Scouts of America, all "determined to be for the primary benefit of the school or the community," pay no rent for using school facilities. Cultural and civic groups, educational groups, and state and federal governmental groups pay a noncommercial rate designed to reimburse the county for the actual costs for the use of the facilities. Private organizations pay a commercial rate which is five times the noncommercial rate and is intended to approximate market rental rates. For churches, Regulation 8420 establishes a special escalating rate which allows the church to pay the noncommercial rate for the first five years but, thereafter, requires the church to pay a rate which escalates to the commercial rate over the next four years. The regulation provides specifically:

> II. CONDITIONS OF USE
>
> G. Churches
>
> > Churches/religious organizations servicing Fairfax County citizens may be granted use of a school for as many as five years.... Church/religious groups may be authorized usage after five years of use at increasing rental rates until the full commercial rates become effective in the ninth year of use. Only one church may have a contract for continuing use of a single school during any school year.

Regulation 8420 establishes priority of uses, assigning highest priority to school-related programs. It provides, "When space is available at times that do not interfere with the previously stated priorities, school facilities may be scheduled for use by others, such as [cultural, civic, educational, religious and private groups]." Finally, the Regulation reserves to the School Board the right to deny or cancel uses. The Regulation provides no limit to the number of times a user may rent or use the School Board's facilities, and evidence in the record demonstrates that some organizations have been meeting regularly in School Board facilities for over 20 years. Indeed, the Boy Scouts of America have been meeting in School Board facilities for some 80 years.

The School Board freely acknowledges that it has singled out churches for the escalating rental rate structure to encourage them to go elsewhere, out of a concern for violating the Establishment Clause of the U.S. Constitution. Homer E. Rhoads, the person responsible for administering the rental of the School Board's facilities and for "devising the current Regulation 8420," stated in his affidavit filed in the district court:

> [W]e determined that churches should not be permitted to use the schools indefinitely at a rental rate that was well below market. We believed that this would place the school system in the position of supporting long-term religious activities in the schools, in violation of the Constitution. To avoid this problem, we determined to charge an increasing rental rate after the fifth year of use, which would gradually approach the commercial rental rate that we charged to private users.

During the year 1991, about 8,500 groups applied for use of the public school facilities in Fairfax County, and in 1992, 51 churches were utilizing the facilities. Over the ten-year period prior to this litigation, the number of churches using school facilities in any given year ranged from 38 to 91.

Fairfax Covenant Church ("the Church"), an evangelical Christian church which was organized in 1980, currently has about 800 members. The Church began renting school facilities on Sunday mornings, beginning in 1980. Concerned about expending its five years of "low rent" before it was able to obtain its own facility, the Church rented space from another church for the two years between 1982 and 1984. Since 1984, it has rented space from the School Board in three separate schools. Since 1991, it has been renting the auditorium and several classrooms at West Springfield High School. For the first five years, the Church paid rent at a level charged other nonprofit organizations. Then, because of the special rate charged to churches under Regulation 8420, the Church paid increasingly higher rent beginning in 1987, so that by 1991, it was paying five

times the rate charged other nonprofit organizations. The aggregate amount of the increases paid by Fairfax Covenant Church for the period from 1987 through February 1993 was $287,456. Although Fairfax Covenant Church has purchased land for its own facility and raised approximately $2 million of the $3.3 million needed to build a facility, it contends that the escalating rent has had an adverse financial effect on it, making it more difficult for the Church to move from West Springfield High School.

In May 1993, Fairfax Covenant Church filed a complaint under 42 U.S.C. § 1983, alleging that the rental structure of Regulation 8420 violated its First Amendment rights. It requested injunctive relief and demanded damages, with interest, for the rent charged in excess of that charged to other nonprofit organizations and churches which have not rented for more than five years.

Ruling on cross motions for summary judgment, the district court found that Regulation 8420 violated the Church's First Amendment rights. Relying principally on *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Board of Education v. Mergens*, 496 U.S. 226 (1990), the court concluded, "[T]his type of content-based regulation which unduly burdens speakers' free exercise of religious beliefs at a public forum, as is the Fairfax County School Board's policy, can only be justified by a compelling state interest." The court rejected the School Board's argument that its actions were justified by its concern about violating the Establishment Clause. The district court, however, refused to make its holding retroactive because to do so would produce "substantial inequitable results." The court observed that Fairfax Covenant Church brought this action only after it had been renting for 11 years, and, since other churches would also be benefited by the ruling, the School Board would be confronted with a significant liability. The court said, "[T]he School Board faces liability for its good faith attempt to avoid an Establishment Clause violation in the amount of greater than 1.1 million dollars."

From the district court's judgment, both parties appealed.

II

The arguments of the School Board amount to the contention that the Establishment Clause of the First Amendment justifies the School Board's discriminatory treatment of churches in the rental structure established by Regulation 8420. The School Board argues that below-market rent charged to the churches and long-term or permanent use of school facilities by a church would advance or subsidize "the practice of religion" and therefore violate the Establishment Clause. They take no issue with the district court's finding that the School Board has created a public forum by opening its facilities and that, therefore, the School Board is required to provide some access to these facilities. Thus, the School Board contends that this case may be decided only by resolving an "actual conflict" between the Establishment Clause and the Free Speech Clause or the Free Exercise Clause of the First Amendment.

The First Amendment states, to the extent applicable here, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. Const. amend. I.

Applying the First Amendment to circumstances similar to those before us, the Supreme Court in *Widmar v. Vincent*, 454 U.S. 263 (1981), struck down a state university regulation which allowed a broad array of student groups to use university facilities, but denied religious groups from doing so. The Court held that when a state university creates a public forum by openly accommodating diverse student groups, it may deny a religious group access to that forum *only* upon a showing of some compelling state interest. Although the Supreme Court recognized that state institutions are not required by constitutional mandate to create public fora, the Court held that when they do, they cannot discriminate against or exclude student groups that wish to engage in religious worship and discussion, absent a justification that serves a compelling state interest and is narrowly tailored to achieve that interest. *Id.* at 269-70. The state university in *Widmar* argued that its interest in maintaining the separation of church and state, deriving from the Establishment Clause, was a compelling state interest to justify its exclusion of the

church group. Although the Court acknowledged that the university's interest in complying with the Establishment Clause "may be characterized as compelling," *id.* at 271, it rejected the notion that allowing religious organizations access to an open forum tended to establish religion. The Court stated, "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices," particularly when the forum is open to a "broad class of nonreligious as well as religious speakers." *Id.* at 274. Noting that the Establishment Clause is limited by the Free Exercise Clause and the Free Speech Clause, the Court concluded, "[W]e are unable to recognize the state's interest [in maintaining a greater separation of church and state] as sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech." *Id.* at 276. Any advancement of religion was held to be "incidental" to the secular purpose of securing an open public forum.

In short, *Widmar* held that a policy of equal access to a public forum which allows for religious uses does not conflict with the Establishment Clause under the test adopted in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (A policy may withstand an attack that it violates the Establishment Clause if (1) it has a secular legislative purpose; (2) its principal or primary effect is not to advance or inhibit religion; and (3) it does not foster an excessive government entanglement with religion.).* The vitality of *Widmar* was reaffirmed recently in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S. Ct. 2141 (1993); *cf. Board of Education v. Mergens*, 496 U.S. 226, 247-49 (1990) (plurality opinion) (applying *Widmar's* holding and analysis to similar issues under the Equal Access Act, 20 U.S.C. §§ 4071-4074).

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* We are aware of the repeated criticisms of the *Lemon* test and are mindful that the test may be clarified in *Board of Education v. Grumet*, which the Supreme Court recently agreed to hear. 62 U.S.L.W. 3375 (1993). In his concurring opinion in *Lamb's Chapel*, 113 S. Ct. at 2150, Justice Scalia stated, "Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's [*Lemon* test's] heart." Until *Lemon* is overruled, however, we are obliged to apply it, although we note that a standard more accommodating to the Free Exercise Clause would not change our decision here.

We can find no basis to distinguish the circumstances essential to the Court's holding in *Widmar* from those of record here. See also *Lamb's Chapel*, 113 S. Ct. at 2147-48 (holding that access to public high school facilities available to a restricted scope of public groups was still subject to *Widmar* and could not be restricted on the basis of the user's religious perspective). We therefore conclude that Regulation 8420 discriminates against religious speech in violation of the Free Speech Clause.

Regulation 8420 also interferes with or burdens the Church's right to speak and practice religion protected by the Free Exercise Clause. *See, generally,* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 Chic. L. Rev. 115, 117 (1992) (noting that Free Exercise Clause is intended to preserve from undue government interference "full and equal" rights of religious believers "to define their own way of life, so long as they do not interfere with the rights of others"). Since the School Board is unable to advance a compelling state interest to justify Regulation 8420's discrimination against churches, we conclude that, in addition to violating the Church's free speech rights, Regulation 8420 also violates the Church's rights to exercise religion freely. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993) (laws which discriminate on the basis of religion are valid only if narrowly tailored to serve a compelling state interest).

Seeking to distinguish the circumstances that are essential to the holding of *Widmar* from the circumstances here, the School Board argues that the issue here is squarely one of determining whether below-market rents combined with long-term or permanent use by a church of public school facilities runs afoul of the Establishment Clause. It seeks to place this case within the scope of the exception described in *Widmar*: "At least in the absence of empirical evidence *that religious groups will dominate* UMKC's open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's 'primary effect.' " 454 U.S. at 275 (emphasis added). The School Board's position is that long-term or permanent use of School Board facilities would constitute such domination. The empirical evidence of domination referred to in

Widmar, however, is not fulfilled by the School Board's *anxiety* or *concern* about whether the empirical circumstances could exist in the future. Mere speculation that a nonexclusive access to a public forum might ripen into a violation of the Establishment Clause, absent any facts suggesting that probability, is not a justification sufficiently compelling to burden free access to the forum. Rather than having the effect of remedying the concern about the Establishment Clause, the School Board's policy of rent discrimination against religious organizations moves the School Board into a non-neutral, antireligion corner by burdening free speech and the free exercise of religion.

The School Board's concern about the establishment of religion is not only unfounded but is also reflective of a one-sided view of the First Amendment. The School Board created a public forum to which it provides access to all sorts of uses, including religious uses. In a given year, it receives approximately 8,500 applications for use of its 172 schools, about 50 of which are from churches. None of the users receives a lease for more than a year, and the Board has reserved the right to deny or terminate any use when to do so is "in the best interest of the school system." No evidence was presented that Fairfax Covenant Church dominated the School Board's rental capacity. Nor is there evidence that the Board had to deny anyone else access to the forum by reason of Fairfax Covenant Church's lease. Moreover, no one has even hinted that the current policy of providing religious groups access to public school facilities after hours shows a School Board preference for religion or for a particular sect of religion.

The School Board's expressed concern about subsidizing religious practice is likewise unfounded. It contends that its below-market rental rate to churches amounts to direct financial subsidy and therefore establishes a religion in violation of the Establishment Clause, relying on *School District of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985) (holding that the Establishment Clause absolutely prohibits government-financed or government-sponsored "indoctrination into the religious beliefs of a particular religious faith"), and *Tilton v. Richardson*, 403 U.S. 672 (1971) (holding as an

improper subsidy the use of public funds to help construct buildings for religious colleges, where the government prohibits religious use of those buildings for only 20 years). These cases, however, do not control the circumstances here. Regulation 8420 charges churches that use the school for less than five years the same rate as it charges other nonprofit cultural and civic groups. This rent is designed to reimburse the School Board for any expense incurred by the use of the school. Rather than subsidizing a church user, such a cost-recovering rent in fact provides money to the School Board to offset its ongoing expenses for school facilities. This is particularly so since there is no evidence to suggest that the School Board's facilities are used to capacity and that the loss of a church user would be replaced by a private group paying market rental. In short, the argument that a direct subsidy is involved here lacks factual support.

Moreover, the Supreme Court in *Widmar* rejected these very arguments in circumstances completely analogous to those presently under consideration. In holding that the costs of *maintaining a public forum* do not advance the views and beliefs of those using the forum, the Supreme Court rejected the applicability of *Tilton* to these circumstances. It said:

> In *Tilton* the Court was concerned that a sectarian institution might convert federally funded buildings to religious uses or otherwise stamp them with the imprimatur of religion. But nothing in *Tilton* suggested a limitation on the State's capacity to maintain forums equally open to religious and other discussions. Cases before and after *Tilton* have acknowledged the right of religious speakers to use public forums on equal terms with others.

454 U.S. at 273 n.12.

The question of how sustained a religious use of a public forum or preoccupying that use must be in order to constitute a domination of the forum is a factual one. The record in this case contains no

evidence to suggest that the School Board's maintenance of a public forum, to which a wide array of nonreligious and religious speakers are permitted to come, is interpreted by the community to constitute a religious endorsement by the School Board. *See Lamb's Chapel*, 113 S. Ct. at 2148. Moreover, the School Board must remain mindful of its obligation, when providing a public forum, of preserving the public's rights under the Free Exercise Clause. Accordingly, we affirm the district court's ruling that Regulation 8420, which adopted a rate structure that discriminates against religious uses of the School Board's public forum, violates the Free Speech and Free Exercise Clauses of the First Amendment.

III

In its appeal, Fairfax Covenant Church contends that the district court erred in concluding that "the retroactive application of its decision is not warranted." Relying on *American Trucking Associations v. Smith*, 496 U.S. 167 (1990) (plurality opinion), and *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the district court concluded that because the School Board acted in good faith and the Church waited 11 years to file, it would be inequitable to assess damages, particularly since this case may generate further suits. It estimated that the School Board's total exposure would exceed $1.1 million. Taking these findings together with the observation that an award of damages would not further "the principle of treating similarly those religious and non-religious groups using an open public forum," the district court concluded that "retroactive application of its decision is not warranted."

Before reviewing the district court's application of the *Chevron* criteria to this case, a review of the principles governing retroactivity of judicial decisions is useful. It is axiomatic in our system that courts, when announcing their decisions, decide actual cases and controversies, *see* U.S. Const., art. III, § 2, and that courts are not charged with responsibility for making new, prospective rules for society. That function is typically legislative. When a legislature enacts rules for prospective application to society, it cannot practicably anticipate all the circumstances to which its enactments might

apply, or how they might apply. Its enactments are, of necessity, general. Courts, presented with actual cases and controversies, must particularize their rulings, and in that context they may announce results or interpretations not previously obvious or which change earlier interpretations. To that extent, these court decisions might be thought to contribute "new law." But even then, the decisions almost always apply retroactively because they apply and interpret rules and principles that governed the conduct of the parties at the time that the controversy arose. Retroactive application of decisions is thus the rule inherent in the judicial function.

Beginning with *Linkletter v. Walker*, 381 U.S. 618 (1965) (in the context of a criminal case), and *Chevron Oil* (in the context of a civil case), the Supreme Court began with greater frequency to apply decisions prospectively where circumstances indicated an unusually disruptive or inequitable result if a decision announcing a "new law" were to be applied retroactively. Sometimes, the prospective application was limited to the case before the Court, so-called "selective prospectivity," and in other cases the prospective application applied to all cases then pending, so-called "pure prospectivity." In *Chevron*, the Court announced a test for determining when court decisions may be applied prospectively:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106 (internal citations omitted).

Only recently has the Supreme Court cast serious doubt upon the practice of departing from the traditional rule of retroactive applications. *See Harper v. Virginia Dept. of Taxation*, 113 S. Ct. 2510, 2517 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases...."); *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991) (opinions of Justices Souter, White, Scalia and Blackmun, representing the views of six justices). Though the precise issue in *Harper* was so-called "selective prospectivity," every indication in the opinion of the Court is that its logic would also forbid all types of prospectivity. *See Harper*, 113 S. Ct. at 2517 ("Our approach to retroactivity heeds the admonition that 'the Court has no more constitutional authority in civil cases than in criminal cases to disregard current law ....'"); *id.* at 2527 (O'Connor, J., dissenting) ("Rather than limiting its pronouncements to the question of selective prospectivity, the Court intimates that pure prospectivity may be prohibited as well."). It might not be reading too much into *Harper* and *James B. Beam* if we were to conclude that *Chevron*, adopting the test for determining when cases may be enforced prospectively, has lost all vitality. We are struck, however, by the notable absence in *Harper* of any statement that *Chevron* is overruled for use in civil cases involving a question of "pure" prospectivity or that all prospective decisionmaking is prohibited. Nevertheless, even if *Chevron* criteria are applied to the circumstances of this case, we conclude it was error for the district court to have refused to apply its decision retroactively.

In the case before us, the first two factors of *Chevron* need not be analyzed further, since they have already been disposed of by our analysis on the merits. As we noted, we are satisfied, as was the district court, that the holding in *Widmar*, a 1981 decision, unremarkably controls the decision here and that the district court did not establish a new principle. It is the third factor of *Chevron*, which takes into account *inequities* of applying the normal rule of retroactivity, that the district court relied on to apply its ruling

prospectively. In support of its ruling, the court noted that the defendant acted in good faith, that the plaintiff waited 11 years to file its suit, and that the amount of damages is substantial. While the district court was properly concerned with the public welfare, it failed to appreciate that its decision was readily foreseeable in light of *Widmar*, and that defenses available to the School Board in the litigation will help substantially to ameliorate its financial exposure.

The good faith of a defendant, relied on by the district court, may be relevant when the elements of a cause of action, or where a defense to it, depend on the defendant's state of mind. Moreover, *bad* faith may be relevant to preclude any equitable application of the law. But in the circumstances here, whether the defendant acted in good faith is irrelevant and barely contributes to any possibility of an inequity. If the School Board was wrong, even innocently, it should not be allowed to retain illegally collected rent.

With respect to the $1.1 million damages exposure, we are also not impressed. In this case, the claim is for slightly more than $280,000, plus interest. That amount, moreover, is subject to any defenses pleaded by the School Board, such as laches and limitations. Against an annual operating budget of $850 million, we cannot say that the potential award in this case is so substantial as to fall under the inequitable-result exception in *Chevron*. As for other claimants who might benefit from this decision, their claims, if they can be established, would also be subject to limiting defenses. To speculate here on the possible awards that might be entered would be of no benefit to the discussion.

Finally, any inequity arising from the fact that Fairfax Covenant Church waited 11 years to file suit will be directly offset by the application of the doctrine of laches and limitations when this case is remanded.

For the reasons given, we affirm the district court's ruling which found Regulation 8420 unconstitutional, but conclude that the district court erred in failing to follow the normal rule that its decision

apply retroactively. Accordingly, we vacate the judgment and remand this case for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

ORDER

March 17, 1994

The Court amends its opinion filed February 28, 1994, as follows:

On page 5, first full paragraph, line 1 – the paragraph is corrected to begin "In May 1992, Fairfax Covenant Church filed a complaint . . . ."

For the Court – By Direction

/s/ Bert M. Montague
Clerk

APPENDIX B

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

March 31, 1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 93-1334, 93-1382

FAIRFAX COVENANT CHURCH,

Plaintiff-Appellant/Cross-Appellee,

v.

FAIRFAX COUNTY SCHOOL BOARD,

Defendant-Appellee/Cross-Appellant.

NATIONAL SCHOOL BOARDS ASSOCIATION,

Amicus Curiae.

On Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, District Judge.
(CA-92-743-A)

Appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

IT IS FURTHER ORDERED that the motion of the National School Boards Association to file amicus curiae brief is granted.

Entered at the direction of Judge Niemeyer from a penal consisting of Judge Niemeyer, Chief Judge Ervin and Judge Wilkins.

For the Court,

/s/ Bert M. Montague
Clerk

APPENDIX C

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT STAYING ISSUANCE OF THE MANDATE

April 8, 1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 93-1334, 93-1382

FAIRFAX COVENANT CHURCH,

Plaintiff-Appellant/Cross-Appellee,

v.

FAIRFAX COUNTY SCHOOL BOARD,

Defendant-Appellee/Cross-Appellant.

NATIONAL SCHOOL BOARDS ASSOCIATION,

Amicus Curiae.

On Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, District Judge.
(CA-92-743-A)

Appellant has filed a motion to stay the mandate.

The Court grants the motion and stays issuance of the mandate for thirty days pursuant to Federal Rule of Appellate Procedure 41(b).

Entered at the direction of Niemeyer, with the concurrence of Chief Judge Ervin and Judge Wilkins.

For the Court,

/s/ Bert M. Montague
Clerk

APPENDIX D

MEMORANDUM OPINION OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

January 22, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FAIRFAX COVENANT CHURCH,

Plaintiff,

v. CIVIL ACTION No. 92-743-A

FAIRFAX COUNTY SCHOOL BOARD,

Defendant.

HILTON, District Judge.

This matter came before the Court on cross motions for summary judgment on the Plaintiff Fairfax Covenant Church's request for a permanent injunction, declaratory judgment, and for compensatory damages of not less than $235,000 plus interest to reimburse plaintiff for extra rent the church has paid under the policy challenged in this case. A motion for summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, and affidavits, if any, "show that there is no genuine issue as to any material fact" in dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 91 L. Ed. 2d

202, 106 S. Ct. 2505 (1986)). The parties to this action agree that there are no genuine issues of material fact and that this matter is ripe for determination by this court.

Fairfax Covenant Church is an evangelical Christian church that was established in 1980. The congregation gathers for worship, fellowship and Biblical teaching every Sunday. The Church is currently in its eleventh year of renting Fairfax County School Board's facilities for its meetings. The Church currently rents the auditorium, gymnasium, and some classrooms at West Springfield High School for its weekly Sunday morning service. During the first five years of renting the facilities, it paid the same rate as other no-profit groups. During year six, it paid double the rental rate, during year seven it paid triple, and during year eight it paid four times the rental rate. Since year nine, the Church pays the School Board the "commercial rental rate," which is five times the regular rate, for the use of these facilities. The current rental contract expires in April 1993. The Church alleges that it is currently in its sixth year of being overcharged for rent by the School Board. Over this period of time, the Church has paid approximately $235,000 more in rent than it would have if its meetings did not have religious content.

Defendant Fairfax County School Board allows an array of community groups to rent its facilities during weeknights and weekends. An estimated 9000 groups and individuals met at the approximately 180 school district facilities available for rent during the 1991-92 school year. The School Board's policy is governed by Regulation 8420. Regulation 8420 allows a broad range of community groups to meet in the schools, including youth groups, Fairfax County employee organizations, cultural and civic groups, colleges and universities, state and federal government agencies, private organizations and individuals, and churches. Virtually any group is allowed to rent the Fairfax County School Board's facilities.

Nevertheless, Regulation 8420 treats churches and other religious groups differently than all other organizations. The regulation states that "church/religious groups may be authorized usage

after five years of use at increasing rental rates until the full commercial rates become effective in the ninth year of use." Thus, for the first five rental years, churches may rent school facilities at the same rate as all other groups. After five years, only churches pay the increasingly higher rates. In addition, the "Standard Operating Procedure for Community Use of School Facilities — Church/Religious Organizations" requires churches to provide "satisfactory evidence of progress towards the construction or acquisition of a church site is presented to the coordinator." No other rental group is required to make such a showing. Regulation 8420 further provides a chart which states that organizations pay "no fee" for use of the buildings if the "school or the community is the primary beneficiary." This "no fee" provision does not apply to "religious services or religious instructions."

The Fairfax County School Board maintains this policy because it believes the Establishment Clause of the First Amendment mandates that it charge religious groups more rent than other groups on a long-term basis. The School Board argues that to allow church groups to use school facilities on a long-term basis, at a low rental rate, would constitute the establishment of religion. *See Harris v. McRae*, 448 U.S. 297, 319, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (1980); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971) (The Establishment Clause prohibits Congress and the states via the Fourteenth Amendment from passing any law "respecting an establishment of religion." Government action does not violate the Establishment clause if the action has: (1) a secular legislative purpose; (2) if its principle effect neither advances nor inhibits religion; and (3) if the action does not foster excessive government entanglement with religion.).

By relying primarily on Establishment Clause analysis, the School Board ignores the open forum doctrine rationale, which is applicable to the set of facts presently before this Court. The School Board, by its policy of renting school facilities to a broad range of community groups has created an open, or public forum. A government facility becomes an open forum when the government allows it to be "generally open to the public" for a broad range of

expressive activities. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983).

In *Widmar v. Vincent*, 454 U.S. 263, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981), which is the modern landmark case dealing with religious groups' access to public education facilities, the Supreme Court ruled that religious speech cannot be barred from a limited public forum simply because it is religious speech. In that case the University of Missouri-Kansas City allowed student groups to meet in campus facilities, but excluded a student evangelical Christian Group from meeting on campus solely because it was a religious organization. The Court held that the university discriminated against the student group and individuals based on "their desire to use the open forum to engage in religious worship and discussion. These are forms of speech protected by the First Amendment." 454 U.S. at 269.

Further, the Court noted that "an open forum . . . does not confer any imprimatur of state approval on religious sects and practices." 454 U.S. at 274; *see also Westside Community Schools v. Mergens*, 496 U.S. 226, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990) (principles of *Widmar* extended to speech in forums at the secondary school level). In fact, by creating a forum generally open for use by various groups, the Fairfax County School Board does not thereby endorse or promote any of the particular ideas aired there. Undoubtedly, many of the views that are advocated are those with which the School Board desires no association. *See Widmar*, 454 U.S. at 271 n.10.

In addition, school facilities may be deemed public forums if school authorities make open by either "policy or practice" those facilities for "indiscriminate use by the general public." *Perry*, 460 U.S. at 45-46. In the present case Fairfax County School Board has created an open forum for expression through both policy and practice, and thus this forum for expression is protected by the Free Speech Clause of the First Amendment. The Fairfax County School Board policy envisions use of facilities for a broad array of expressive activities. It explicitly states that it allows youth groups, Fairfax

County employee organizations, cultural and civic groups, colleges and universities, churches, state and federal government agencies, and private organizations and individuals to meet in the facilities. Clearly it is the policy of Fairfax County School Board to allow virtually anyone to rent its facilities.

Other courts have found similar policies to create open forums. *See Gregoire v. Centennial School Dist.*, 907 F.2d 1366 (3d Cir. 1990) (school district had an open forum policy when it permitted meetings by civic groups, cultural activities, resident service organizations, adult education classes and labor union meetings); *Concerned Women for America v. Lafayette County and Oxford, Mississippi Public Library*, 883 F.2d 32, 34 (5th Cir. 1989) (public library's express exclusion of religious groups from meeting in its auditorium was unconstitutional because the library was an open forum — it had a policy of allowing any and all other meetings of a "civic, cultural or educational character" to use the facility). Cases have further acknowledged the right of religious speakers to use such forums on equal terms with others. *See Widmar*, 454 U.S. at 272 n.12; *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 69 L. Ed. 2d 298, 101 S. Ct. 2559 (1981); *Saia v. New York*, 334 U.S. 558, 92 L. Ed. 1574, 68 S. Ct. 1148 (1948).

Fairfax County School Board creates an open forum by practice as well since, for example, during the 1991-92 school year, the School Board has allowed approximately 9000 groups to meet in the 180 school facilities available for such use. Because it is clear that the Fairfax County School Board has created an open forum for expression, First Covenant Church [sic] cannot be treated differently from other groups that use the forum simply because of the content of its speech. *See Widmar v. Vincent*, 454 U.S. 263, 70 L. Ed. 2d 440, 102 S. Ct. 269 .

To focus only on religious groups who use the School Board's open forum also directly contradicts the recent Supreme Court decision of *Employment Division v. Smith*, 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990) and thus also violates the Free Exer-

cise Clause. In *Smith*, the Supreme Court found that "the government may not . . . impose special disabilities on the basis of religious views or religious status." 494 U.S. at 877. Further, courts are to "strictly scrutinize governmental classifications based on religion." 494 U.S. at 886 n.3.

Even the Attorney General admits that, owing to the Free Exercise Clause of the First Amendment, the School Board "obviously could not exclude churches and other facilities as long as it allowed other groups the same privilege." Va. Op. Ag. 54-173, at 3 (August 10, 1990); *see id.* at 877. In *Widmar*, the Court found that

> [i]n order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the [state] must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

Widmar, 454 U.S. at 269-70.

Thus, this type of content-based regulation which unduly burdens speakers' free exercise of religious beliefs at a public forum, as is the Fairfax County School Board's policy, can only be justified by a compelling state interest. *Perry*, 460 U.S. at 45; *Widmar*, 454 U.S. at 270; *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 800, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985); *Carey v. Brown*, 447 U.S. 455, 461, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980). The Fairfax County School Board, and the Attorney General of Virginia, argue to no avail that the "tension" between the Establishment Clause and the Free Exercise Clause provides this compelling interest.

Since the School Board's policy singles out only churches for increased rental payments, this policy violates the Free Speech Clause because such a fee structure is content-based. In *Simon & Schuster v. New York Crime Victims Bd.*, 116 L. Ed. 2d 476, 112 S. Ct. 501

(1991), the Supreme Court found that a "statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Id.* at 508. By charging religious groups alone the escalating rental fee scale and having no compelling interest (as discussed below) to rationalize the higher rate, the School Board violates a fundamental premise of the Free Speech Clause.

The Supreme Court has denounced content-based financial burdens on expressive activities in other cases which are applicable to the present matter. In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 95 L. Ed. 2d 209, 107 S. Ct. 1722 (1987), the Supreme Court struck down a state sales tax scheme that taxed magazines, but exempted newspapers and religious, professional trade and sports journals, as well as those journals published within the state. The Supreme Court found this tax scheme unconstitutional since the statute was content-based. In *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972), the Court found that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Likewise, charging the escalating rental fee to First Covenant Church [sic] simply because of its religious message is in violation of the First Amendment.

The Supreme Court has rejected application of the Establishment Clause as a compelling justification for discrimination against the religious content of speech in the landmark cases of *Mergens*, 110 S. Ct. at 2370-73, and *Widmar*, 454 U.S. at 271. First, the Supreme Court in both *Widmar* and *Mergens* held that a neutral policy allowing both religious and non-religious speakers equal access to an open forum embodies a permissible secular purpose and that such a neutral policy "would in fact *avoid* entanglement with religion." *Mergens*, 110 S. Ct. at 2370 (quoting *Widmar*, 454 U.S. at 271-72).

Second, the Supreme Court has also ruled that it does not violate the Establishment Clause for religious groups to partake of

governmental financial benefits that are available to everyone. *See Mueller v. Allen*, 463 U.S. 388, 77 L. Ed. 2d 721, 103 S. Ct. 3062 (1983) (upheld a Minnesota tax deduction for student expenses at all schools, including parochial schools); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481, 88 L. Ed. 2d 846, 106 S. Ct. 748 (1986) (rejected a claim by the state of Washington that it was required to ban a blind person from a state program funding the college educations of blind people, because he wanted to go to a Bible college); *Bowen v. Kendrick*, 487 U.S. 589, 101 L. Ed. 2d 520, 108 S. Ct. 2562 (1988) (upheld federal program to teach sexual chastity to teenagers that funded many secular as well as religious groups to promote that goal); *Walz v. Tax Comm'n*, 397 U.S. 664, 25 L. Ed. 2d 697, 90 S. Ct. 1409 (1970). These decisions factually match the situation in the present case because they involve government programs that provided financial benefits to everyone, including religious groups or individuals. In the present case Fairfax County School Board permits generally all groups to meet in its schools for years at a time, which is a permissible *secular* purpose for the policy.

Treating churches the same as everyone else, which Fairfax County School Board easily could do, cannot be viewed as treating churches better than everyone else. "[R]eligious institutions need not be quarantined from public benefits that are neutrally available to all." *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736, 746, 49 L. Ed. 2d 179, 96 S. Ct. 2337 (1976). Thus, the Supreme Court has previously questioned the School Board's theory because it would mean that a "church could not be protected by the police and fire departments, or have its sidewalks kept in repair. The Court never has held that religious activities must be discriminated against in this way. Neutrality is what is required." *Id.*, 426 U.S. at 747.

Not only does the School Board's policy fail under the open forum doctrine, but the policy also fails under Establishment Clause analysis, as examined pursuant to *Lemon v. Kurtzman*. If anything, the School Board's policy *violates* the second prong of the Lemon test, since the policy and actions of the School Board have the "primary effect" of advancing non-religion and inhibiting religion.

The Establishment Clause requires *neutrality* towards religion. "Indeed the message is neutrality rather than endorsement; if a state refuses to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." 110 S. Ct. at 2371. Since the School Board charges religious users more than all other users, the School Board's policy arguably violates this prong of the Establishment Clause.

Allowing religious groups to meet in an open forum like any other group, and pay the same rent as other groups, does not have the "primary effect" of advancing religion. It both allows and promotes and the free exchange of ideas and speech. *See Widmar*, 454 U.S. at 273-74. Obviously, Fairfax Covenant Church enjoys some secondary benefit of having its views publicly expressed at West Springfied High School, but the Supreme Court in *Widmar* explained that "a religious organization's enjoyment of merely 'incidental' benefits does not violate the prohibition against the 'primary advancement' of religion." *Id.* at 274; *see also Walz v. Tax Comm'n*, 397 U.S. 664, 25 L. Ed. 2d 697, 90 S. Ct. 1409 ; *McGowan v. Maryland*, 366 U.S. 420, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961).

Further, allowing religions groups to meet in an open forum does not violate the third prong of the *Lemon* test, since it does not "excessively entangle" church with state. 454 U.S. at 272. In fact, the Court in *Widmar* found that one could risk *greater* entanglement by attempting to enforce its exclusion of religious worship and religious speech, in the form of invasive monitoring to prevent religious speech at meetings where such speech could occur. *Id.* at 272 n.11. More generally, "it is common ground that nothing in the Establishment Clause requires the State to suppress a person's speech merely because the *content* of the speech in religious in character." *Bender v. Williamsport Area School Dist*, 475 U.S. 534, 552, 89 L. Ed. 2d 501, 106 S. Ct. 1326 (1986) (Burger, C.J., dissenting).

Finally, the First Amendment ultimately *requires* "the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." *Everson v. Board of Educ.*, 330 U.S. 1, 18, 91 L.Ed.

711, 67 S. Ct. 504 (1947). As the Supreme Court stated in *Widmar*, "where the state has opened a forum for direct citizen involvement, exclusions bear a heavy burden of justification." 454 U.S. at 268. The Fairfax County School Board's reliance on the Establishment Clause clearly does not justify their discriminatory policy towards First Covenant Church [sic].

This court accordingly finds that the Fairfax County School Board's policy, Regulation 8420, is violative of the First Amendment, in designating all religious groups for the School Board facilities at a rental rate higher than the rate charged to non-religious community groups. Therefore, the Fairfax County School Board is enjoined from enforcing Regulation 8420, or any other policy which would charge religious organizations rental rates which are disparate from those charged to non-religious community groups.

Lastly, plaintiff, First Covenant Church [sic], requests damages in the amount of $235,000.00 plus interest to reimburse plaintiff for the extra rent the church has paid pursuant to the School Board's Regulation 8420. While this request was in the Complaint, the issue has not been further addressed in the submissions of the parties. The plaintiff should file within ten (10) days any request for damages, with supporting memorandum, and the Defendant shall respond within ten (10) days, as to whether any amount of damages is warranted.

An appropriate Order shall issue.

/s/ Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
January 22, 1993

ORDER

This matter came before the Court on Cross Motions for Summary Judgment upon Plaintiff Fairfax Covenant Church's request for a permanent injunction, declaratory judgment and damages. For reasons stated in the accompanying memorandum opinion, it is hereby

ORDERED that plaintiff's motion for summary judgment is GRANTED. It is further ORDERED, ADJUDGED, AND DECREED that Fairfax County School Board Regulation 8420 is unconstitutional, and defendant Fairfax County School Board is hereby ENJOINED from charging religious groups a disparate rental rate pursuant to Regulation 8420 or to any subsequent policies. Counsel for plaintiff shall file within ten (10) days any request for damages with supporting memorandum, and the defendant shall respond within ten (10) days as to whether any amount of damages is warranted.

/s/ Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
January 22, 1993

APPENDIX E

MEMORANDUM OPINION OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

March 11, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FAIRFAX COVENANT CHURCH,

Plaintiff,

v. CIVIL ACTION No. 92-743-A

FAIRFAX COUNTY SCHOOL BOARD,

Defendant.

HILTON, District Judge.

This matter came before the court on Defendant's Motion for Prospective Relief Only, and on Plaintiff's Motion for Compensatory Damages. On January 22, 1993 this court determined that the Fairfax County School Board's rental policy, Regulation 8420, was unconstitutional. Plaintiff, First Covenant Church [sic], who has rented public school facilities for the past 11 years, requests damages in the amount of $287,455.60, plus interest in the amount of $62,234.50, to reimburse plaintiff for the extra rent the church has paid over the years pursuant to the School Board's Regulation 8420.

In *Chevron Oil v. Huson*, 404 U.S. 97 (1971), the Supreme Court set out several factors to use as a guide for determining whether a decision should be denied retroactive application:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second . . . whether retrospective operation will further or retard its operation. Finally, . . . weigh[ ] the inequity imposed by retroactive application.

404 U.S. at 106-07 (citations omitted). Because the factors are interrelated, each factor need not be "fully satisfied" to preclude retroactivity. *Grimes v. Owens-Corning Fiberglass Corp.*, 843 F.2d 815, 819 (4th Cir.), *cert. denied*, 488 U.S. 889 (1988). This court also recognizes that the process of "reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old is 'among the most difficult of those which have engaged the attention of courts, state and federal.'" *Lemon v. Kurtzman*, 411 U.S. 192, 198 (1973) (*Lemon II*) (plurality opinion) (quoting *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940)). Based on consideration of the factors enunciated in *Chevron*, this court finds that relief based on its decision of January 22, 1993 must be applied prospectively only.

First, this court was guided by the principles of *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Board of Educ. v. Mergens*, 496 U.S. 226 (1990), in deciding the novel and complicated issues presented in this case. Even though the decision was within the "logical compass" of those Supreme Court decisions, that fact alone is not conclusive in deciding whether the current decision is a new rule of law. *Butler v. McKellar*, 494 U.S. 407, 415 (1990). As the Supreme Court acknowledged in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (*quoted in Lemon II*, 411 U.S. at 206), the "lines of demarcation" in this sensitive area of constitutional law are also "dimly perceived."

The Virginia Attorney General's opinion, Va. Op. Ag. 54-173 (August 10, 1990), which upheld the constitutionality of Regulation 8420, and the various state courts who determined similar issues in a matter differently than this court, make it a reasonable assumption that this court's decision was not "clearly foreshadowed" by earlier authority. *See, e.g., Pratt v. Arizona Bd. of Regents*, 110 Ariz. 466, 520 P.2d 514 (1974); *O'Hara v. School Bd.*, 432 So. 2d 1356 (Fla. Dist. Ct. App. 1983); *Resnick v. East Brunswick Township Bd. of Educ.*, 77 N.J. 88, 389 A.2d 944 (1978). Given also that authority directly on point was lacking, this was an issue of first impression. Thus, the first *Chevron* factor inclines towards non-retroactivity.

Second, retroactive application of this Court's decision will not further the principle advanced in this case regarding the treatment of religious groups equally with other non-religious groups that have rented school board facilities for longer than five years. In *American Trucking Ass'n v. Smith*, 496 U.S. 167 (1990) (plurality opinion), the Supreme Court declined to impose retroactively a decision regarding a violation of the "negative" Commerce Clause after balancing state options to remedy the violation. Such options included retroactive payments to those who had paid more pursuant to the unconstitutional regulation or a retroactive increase in taxes to those who had paid less. The Court noted that the first option would impinge on the state's treasury, while the state's second option would be administratively burdensome, could create other constitutional problems, and could unfairly penalize other taxpayers. *Id.* at 179-80. Neither option would further the principles advanced in the case, and would produce substantial inequitable results.

This court faces a dilemma somewhat comparable to that of *American Trucking*, and thus finds that *Chevron's* second and third factors balance in favor of non-retroactivity, since, weighing all factors, retroactive application of the court's decision will not advance the principle of treating similarly those religious and non-religious groups using an open public forum. Further, the retroactive application of this court's decision would produce substantial

inequitable results. The School Board acted in a good faith attempt to avoid a collision with the Establishment Clause when it created Regulation 8420. In spite of its good intentions, the School Board ran afoul of other sections of the Constitution, namely the Free Speech Clause. Fairfax Covenant brought this action only after it had already been renting from the School Board for 11 years, pursuant to the escalating rental structure that had been in effect since 1982. In addition, under the rent reimbursement scheme suggested by the plaintiff, the School Board faces liability for its good faith attempt to avoid an Establishment Clause violation in the amount of greater than 1.1 million dollars.

Lastly, Fairfax Covenant has obtained substantial relief in the form of a permanent injunction requiring that it pay no more than civic and cultural groups that rent facilities in the future. *See, e.g., id.* at 198-99. When balancing this third *Chevron* factor with those aforementioned, the Court must conclude that the retroactive application of its decision is not warranted.

An appropriate Order shall issue.

/s/ Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
March 11, 1993

ORDER

This matter came before the Court on Defendant's Motion for Prospective Relief Only, and on Plaintiff's Motion for Compensatory Damages. For reasons stated in the accompanying memorandum opinion, it is hereby

ORDERED that plaintiff's Motion for Compensatory Damages is hereby DENIED, and Defendant's Motion for Prospective Relief Only is GRANTED.

/s/ Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
March 11, 1993

APPENDIX F

OPINION OF THE ATTORNEY GENERAL OF THE COMMONWEALTH OF VIRGINIA

August 10, 1990

The Honorable Jane H. Woods
Member, House of Delegates
P.O. Box 1387
Fairfax, Virginia 22030

My dear Delegate Woods:

You ask whether the Fairfax County School Board (the "School Board"), in regulating the use of school facilities by nonschool-related community groups, may impose an increased rental charge on churches or other religious groups that have used a school building continuously for more than five years, while not applying a similar increase to nonreligious groups after the same length of time.

I. *Applicable Regulation*

Fairfax County School Board Regulation 8420 ("Regulation 8420"), dated July 1, 1986, which provides for community use of school facilities, provides, in part:

> Churches/religious organizations servicing Fairfax County citizens may be granted use of a school for as many as five years. Those desiring to establish a long-term use (other than one-time use) for church/religious organizations shall set up an appointment with the coordinator, community use of school facilities, for an orientation on procedures. Church/religious groups may be authorized usage after five

> years of use at increasing rental rates until the full commercial rates become effective in the ninth year of use. Only one church may have a contract for continuing use of a single school during any school year.

Id. § II(G), at 3.

Regulation 8420 does not provide for a similar increase in rental rates for nonreligious community organizations after five years of continuous use of school facilities.

II. *Applicable Constitutional and Statutory Provisions*

The Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.* amend. I.

Article I, § 16 of the Constitution of Virginia (1971) provides, in part:

> And the General Assembly shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this Commonwealth, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or for the support of any church or ministry; but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please.

The Virginia Act for Religious Freedom, adopted in 1786, is set forth in § 57-1 of the Code of Virginia and provides, in part:

> 'That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities.'

Id. (quoting Ch. XXXV, 12 Hening's *Statutes at Large* 84, 86 (1785-1788)).

Section 15.1-24 authorizes counties, cities and towns to "make appropriations of public funds, of personal property or of any real estate to any charitable institution or association, located within their respective limits; provided, such institution or association is not controlled in whole or in part by any church or sectarian society."

III. *Regulation 8420 Must Strike Balance Between Allowing Free Exercise of Religion and Avoiding Establishment or Support of Particular Religious Group*

A local school board may exercise those powers and functions granted to it expressly or by necessary implication. *Commonwealth v. Arlington County Bd.*, 217 Va. 558, 574, 232 S.E.2d 30, 40 (1977). A school board has the power, consistent with state statutes and regulations of the State Board of Education, to operate and maintain its public school buildings and to regulate their use by nonschool-related groups. Section 22.1-79. In so doing, a local school board may not, of course, violate the Constitution of the United States or the Constitution of Virginia.

The First Amendment to the Constitution of the United States prohibits Congress from making laws "respecting an establishment of religion, or prohibiting the free exercise thereof." The establish-

ment clause and the free exercise clause are made applicable to the states and their localities by the Fourteenth Amendment.[1] *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Read together, the establishment clause and the free exercise clause stand for the principle that neither governmentally established religion nor governmental interference with religion will be tolerated. *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970).

Court decisions applying the free exercise clause make it clear that public education officials may not deny religious groups access to public facilities merely because they are religious. The modern landmark case dealing with religious groups' access to public education facilities is *Widmar v. Vincent*, 454 U.S. 263 (1981). There the Supreme Court of the United States held that, by making facilities available for use by student groups, a state supported university creates a limited public forum, and thereby assumes an obligation to justify exclusion of other groups under applicable constitutional norms. *Id.* at 267. Finding that a state university's policy of excluding religious organizations from the use of university property violated the fundamental principle that a state regulation of First Amendment-protected activity should be content-neutral, the Court held that,

> [i]n order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the [state u]niversity must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

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[1] The principles of both the free exercise clause and the establishment clause of the First Amendment are embodied in the provisions of the Constitution of Virginia and the Virginia Act for Religious Freedom, quoted in Part II of this Opinion. *See Crockett v. Sorenson*, 568 F. Supp. 1422 (W.D.Va. 1983); *Jones v. Commonwealth*, 185 Va. 335, 38 S.E.2d 444 (1946). Even if the First Amendment were not applicable to the states and localities, therefore, Virginia governmental entities still would be obligated to seek the same neutrality in their dealings with religious groups.

Id. at 269-70. In *Westside Community Schools v. Mergens*, 495 U.S. ___, 110 L. Ed. 2d 191, 110 S. Ct. ___ (1990), the principles established in *Widmar* were held applicable to state secondary schools.[2]

Under the *free exercise clause* of the First Amendment, therefore, the School Board obviously could not exclude churches and other religious groups from its facilities, as long as it allowed other groups the same privilege. The inquiry does not end there, however, because the *establishment clause* also prohibits the School Board from supporting any particular religious group. The increased rental rate imposed by Regulation 8420 is the School Board's method of attempting to avoid a level of continuing support that would violate the establishment clause, or, in the Constitution of Virginia's terms, "confer any peculiar privileges or advantages on any sect or denomination." Art. I, § 16.

I am not aware of any federal or Virginia case specifically addressing whether an increase in the rental rate charged to religious groups for use of school facilities after a certain period of use, when a similar increase is not charged to other organizations, strikes the appropriate balance between the free exercise and establishment clauses. A prior Opinion of this Office, however, con-

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[2] In *Westside*, the Supreme Court of the United States was actually applying the requirements of The Equal Access Act, 20 U.S.C.S. §§ 4071-4074 (Law. Co-op. Supp. 1990), which obligate federally assisted secondary schools to permit student religious groups equal access to the schools' "limited open forums" during noninstructional time. The Court found that the Equal Access Act did not violate the establishment clause, and was, in effect, a statutory extension of *Widmar's* principles to the secondary school level. The United States Court of Appeals for the Third Circuit has concluded that "[i]n light of the Supreme Court's decision in [*Westside*] it is now clear that a secondary school may, by its acts, create a public forum implicating the same constitutional rules set forth in *Widmar*." *Gregoire v. Centennial School Dist.*, Nos. 89-1658, 89-1692, slip op. at 33 (filed June 22, 1990) (1990 U.S. App. LEXIS 10048).

cludes that a board of supervisors could not lease a surplus county school to a local church, because such an arrangement would place the county in a position of providing aid to religion in violation of the establishment clause. 1982-1983 Att'y Gen. Ann. Rep. 34.

Several cases in other jurisdictions have held that prolonged use of school facilities by a religious congregation without evidence of immediate intent to construct or purchase its own building would be impermissible under the establishment clause. *See O'Hara v. School Bd. of Sarasota County*, 432 So.2d 1356, 1358-59 (Fla. Dist. Ct. App. 1983); *Resnick v. East Brunswick Tp. Bd. of Ed.*, 77 N.J. 88, 389 A.2d 944 (1978); *Pratt v. Arizona Board of Regents*, 110 Ariz. 466, 469, 520 P.2d 514, 517 (1974); *Southside Estates Bapt. Church v. Board of Trustees*, 79 A.L.R.2d 1142, 115 So.2d 697 (1959).

As discussed above, the holdings in *Widmar* and *Mergens* obligate the School Board to base any treatment of religious groups that differs from its treatment of nonreligious groups on a compelling state interest, and to draw its regulation narrowly to serve that interest. In the case of the provision of Regulation 8240 you question, the compelling state interest is the need to abide by the requirements of the First Amendment establishment clause and Article I, § 16 of the Constitution of Virginia to avoid public support for a particular religious group.

I note that Regulation 8240 does not eliminate a church group's use of school facilities after five years. It merely increases the rental rate progressively, until it equals the commercial rate in the ninth year. While Regulation 8240 admittedly does not impose a similar increase on nonreligious community organizations that have met in school buildings for five years, such as scout troops or neighborhood civic associations, the use by such nonreligious groups poses no danger of an establishment clause violation. I note further that if Regulation 8240 induces a particular religious group to move out of a school, the result is not to eliminate religious use of that school, but only to make the school available to other religious groups.

Based on the above, it is my opinion that the questioned portion of Regulation 8240 is narrowly drawn to strike the constitutionally required balance between allowing the free exercise of religion and avoiding the establishment or public support thereof, and that the Regulation is, therefore, a valid exercise of the School Board's powers under applicable federal and state constitutional and statutory provisions.

With kindest regards, I am

Sincerely,

/s/
Mary Sue Terry
Attorney General

APPENDIX G

DECLARATION OF JAMES M. PLUTTE

July 2, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FAIRFAX COVENANT CHURCH,

Plaintiff,

v. CIVIL ACTION No. 92-743-A

FAIRFAX COUNTY SCHOOL BOARD,

Defendant.

1. My name is James M. Plutte, and I have personal knowledge of the facts contained in this declaration. I am employed by the Fairfax County School Board as the Coordinator of the Community Use Section, Office of Facilities Planning Services. I am responsible for administering the rental of school facilities and services for use during non-school hours. I am also responsible for coordinating and publishing the fee schedule reflecting the charges for the use of such facilities and services. Those fees are published annually in Notice 8420.

2. Fees are divided generally into three categories: rental fees, personnel services fees, and special fees. Rental fees are the fees charged for renting such facilities as school cafeterias, gymnasiums, auditoriums, classrooms and athletic fields. Fees for personnel services are charged if a user requires administrative or custodial staff, or certain technical assistance. Special fees are charged for

the use of certain equipment. All users who pay special fees or fees for personnel services are charged the same rate.

3. The amount of the rental fee, by contrast, varies depending upon the nature of the use. There are three basic rental categories: no rental fee; the non-commercial rate; and the commercial rate. Non-commercial rates are designed to cover the out-of-pocket cost for the actual use of the facility, including heating and air-conditioning, lighting and other normal utility use, and wear-and-tear. Commercial rates are designed to approach the market rate that would be paid for comparable facilities.

4. The same commercial rates are paid by private organizations, regardless of whether they are non-profit or for-profit, and churches that have used the facilities for religious purposes for nine years and longer.

5. The same non-commercial rates are paid by cultural and civic groups based in Fairfax County, colleges and universities, agencies of the state and federal governments, and churches that have used the facilities on a temporary basis not exceeding five years.

6. No rental fees are charged to the following groups (except for certain fund-raising activities): the Fairfax County Department of Recreation and Community Services, local county, city or town agencies, officially recognized youth groups such as the Boy Scouts and Girl Scouts, Fairfax County employee organizations, and official student organizations and school-support groups (i.e., Parent-Teacher Associations and Boosters).

7. Private groups charged the commercial rate have included: wedding receptions; groups holding private parties or social events; cultural and civic groups not based in Fairfax County; production companies giving concerts; and businesses holding training meetings or providing financial seminars.

8. Cultural and civic groups based in Fairfax County, and charged the non-commercial rate, have included: Citizens for a Free Vietnam (a Vietnamese cultural association) and the Azerbaijan Cultural Association. There have been relatively few cultural and civic groups in the past that have rented school facilities.

9. Of the following groups that rent school facilities – private groups, cultural and civic groups, and churches – churches are clearly the predominant users and account for a majority of such rentals.

10. Approximately 51 churches currently utilize FCPS facilities. Most churches use the facilities only on a short term basis. Some churches, such as Fairfax Covenant Church, have sought to use school facilities as their principal place of worship on a permanent basis, and they have foregone acquiring their own church facilities as a result. These churches make intensive use of school facilities. For example, Fairfax Covenant Church holds its religious services every week at West Springfield High School. It requires the use of the school auditorium, 14 classrooms, an auxiliary gymnasium and the parking lot. It has up to 800 weekly worshippers. Its use is more intensive, substantial, and long-term than any other non-church group.

11. Pursuant to Regulation 8420, churches that make use of school facilities for nine years or longer are charged the same commercial rental rate that is charged to other private users. By contrast, churches that make only sporadic or temporary use of school facilities not exceeding five years are charged the lower, non-commercial rate. Beginning in the sixth year, as church use approaches long-term or permanent use, the rental rate increases yearly until, in the ninth year, it reaches the commercial rate that is charged to all private users. Churches are not prevented from making long-term use of school facilities thereafter, provided they pay the same rate that is charged to all other private users. (Although a Standard Operating Procedure states that churches in their first five years of use are supposed to demonstrate their efforts to acquire their own

church facilities, churches have not been required to make any such showing. The Standard Operating Procedures are being revised to reflect the actual practice).

12. Fairfax Covenant Church is currently in its eleventh year of use at West Springfield High School. My office has no record of Fairfax Covenant Church having ever objected to the rental rates prior to filing this lawsuit.

13. Fairfax Covenant Church currently pays $601.60 per week in personnel fees for custodial services. Its weekly rental fee for the auditorium, gymnasium and 14 classrooms, based on the commercial rate, is $1,510.

14. Eight churches are in their sixth year of use or longer at school facilities. If non-commercial rental rates were charged to these eight long-term or semi-permanent users, the school system would lose approximately $210,080 in rental fees per year, or $4,040 per week. (This figure does not account for the six churches that are currently in their fifth year of use at FCPS facilities, and that will commence paying an increased rental rate during the next year).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: July 2, 1992 /s/ James M. Plutte

APPENDIX H

DECLARATION OF MARY JEAN L. BOATWRIGHT

July 2, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FAIRFAX COVENANT CHURCH,

Plaintiff,

v. CIVIL ACTION No. 92-743-A

FAIRFAX COUNTY SCHOOL BOARD,

Defendant.

1. My name is Mary Jean L. Boatwright and I have personal knowledge of the facts contained in this declaration. I am a paralegal at Hunton & Williams. During the past week, I have personally inquired into what it would cost to rent private facilities sufficient to accommodate up to 800 people for approximately 4 hours for a Sunday morning meeting of a church group. I have contacted various hotels in Fairfax County and Arlington, and the following information was provided to me.

2. The Best Western Tyson's Westpark Hotel in Fairfax County has 7 available meeting rooms, and can accommodate up to 700 persons in an auditorium. Three of the rooms can accommodate 50 persons. Two rooms can hold 18. One room can accommodate 24 and another room can hold 30. The before-5:00 p.m. rate for the 7 rooms is $1,100. The before-5:00 p.m. rate for the auditorium is $1,000. The cost of 7 rooms and the auditorium would be $2,100.

3. The Fairview Park Hotel in Falls Church can accommodate up to 1,100 people in a theater-style auditorium. The before-5:00 p.m. rate is $4,000. The Hotel also has 14 suites capable of being converted into classroom-style rooms accommodating 20-25 people each. The cost per room is $100. The cost of 14 rooms and the auditorium would be $5,400.

4. The Radisson Hotel in Alexandria has a ballroom that would accommodate up to 1,200 persons. The rate would be $4,500 for use before 5:00 p.m. It also has 14 rooms or suites that would rent for $150.00 each. The cost for 14 rooms and the ballroom would be $6,600.

5. The Sheraton Tysons has a ballroom that would accommodate up to 1,100 persons. The rate would be $1,500. Fourteen rooms would be available at rate of $175 per room. The cost for 14 rooms and the ballroom would be $3,950.

6. The Sheraton Arlington has a ballroom that would accommodate up to 1,000 persons. The rate would be $3,000. Fourteen rooms would be available at rate between $100 and $150. The cost for 14 rooms and the ballroom would range between $4,400 and $5,100.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: July 2, 1992 /s/ Mary Jean L. Boatwright

APPENDIX I

DECLARATION OF HOMER E. RHOADS

July 22, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FAIRFAX COVENANT CHURCH,

Plaintiff,

v. CIVIL ACTION No. 92-743-A

FAIRFAX COUNTY SCHOOL BOARD,

Defendant.

I, Homer E. Rhoads, state that the following facts are true to the best of my knowledge, information and belief:

1. I am currently retired, and my address is 1371 Caminito Diadema, La Jolla, California 92037. Prior to my retirement, I was employed by the Fairfax County School Board from 1968 until April 1991. Between 1971 and my retirement, I was responsible for administering the rental of school facilities for use during non-school hours. I was also responsible for devising the current Regulation 8420, applicable to users of school facilities, including churches. I have personal knowledge of the facts stated in this declaration.

2. In the 1970s, the school system permitted churches to rent school facilities for religious purposes during non-school hours. If a church wished to rent school facilities on a regular basis for more than a year, it was required to provide an annual letter certifying its progress towards the acquisition of its own facilities. This policy

was revised in the late 1970s, when one church notified us that it planned to continue to use school facilities indefinitely and that it had no plans to acquire its own building. In reviewing our records, we realized that some churches had been using the schools for as many as 10 years or longer. Upon advice of counsel, we changed the policy to limit church use to a maximum of five years. We were concerned that permitting long-term or permanent use of school facilities would violate constitutional principles of separation between church and state. We were also concerned that a single church would occupy a particular school indefinitely, to the exclusion of other churches interested in renting the same school.

3. This regulation was again revised in the early 1980s. That revision was prompted because some churches that had used our facilities for the maximum five year period requested permission for additional time to acquire their own facilities, ranging from two-weeks to an additional year or two. At first, we granted several such requests as they came up, since these churches indicated that they were very close to obtaining their own buildings. However, we did not wish to be in the position of having to consider each request on a case-by-case basis, because this required us to question a church about its private construction plans.

4. Accordingly, we decided to revise the regulation to allow for continued use by churches beyond the five year maximum. In consultation with counsel, however, we determined that churches should not be permitted to use the schools indefinitely at a rental rate that was well below market. We believed that this would place the school system in the position of supporting long-term religious activities in the schools, in violation of the Constitution. To avoid this problem, we determined to charge an increasing rental rate after the fifth year of use, which would gradually approach the commercial rental rate that we charged to private users. We did this as a compromise between accommodating the churches' desire to rent school facilities while saving to build their own churches, and avoiding the constitutional danger of allowing long-term or permanent use of a single school facility by a particular church.

5. This rental rate structure operated very well during my tenure. I am aware of only four complaints by churches about the rental rates charged to them. By contrast, approximately 1 to 2 times a year, my office would receive complaints that churches should not be utilizing taxpayer facilities at all. I or my assistant would assure such callers that the school system was not sponsoring or promoting church use in any way, and that churches were required to pay for their use of the facilities. On occasion, some churches that did not use school facilities on a regular basis would express their disappointment if they were unable to rent a particular school as needed, because the building was already occupied by a regular church-user. However, most religious groups that used the schools expressed their appreciation about the rate structure, which was very favorable compared to the alternatives, and expressed their understanding that the school system was required to maintain a proper separation between church and state.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: July 22, 1992 /s/ Homer E. Rhoads

APPENDIX J

DECLARATION OF EUGENE J. KELLY

July 9, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FAIRFAX COVENANT CHURCH,

Plaintiff,

v. CIVIL ACTION No. 92-743-A

FAIRFAX COUNTY SCHOOL BOARD,

Defendant.

I, Eugene J. Kelly, state that the following facts are true to the best of my knowledge, information and belief:

1. I am employed by the Fairfax County School Board as the Assistant Director of the Project Management Section, Office of Design and Construction Services, and I have personal knowledge of the facts in this declaration. My training and experience qualify me to estimate the present cost of constructing school facilities. Prior to my employment with the school system, I served for 20 years as an estimator and project manager for a construction company based in New York, where I specialized in school construction. During the past 11 years, I have been personally involved in the Fairfax County school system's development and construction of numerous school facilities. I am involved in all stages of the construction process, including preliminary design and planning,

preparation of the request for proposals, and actual construction. As part of my responsibilities, I estimate and monitor the cost to the school system for each construction project.

2. The major expenses involved in any construction project are the cost of acquiring the property, the general construction cost, the site work cost, and the cost of furnishing the facilities. Construction costs include all actual expenses paid by the school system to build the facilities, including all necessary heating, air-conditioning, plumbing and electrical work. Site work costs include the expenses for all work outside of the buildings themselves, such as landscaping, grading, laying sidewalks, and installing sanitary sewers. These costs do not include expenses for such things as architectural design, acquiring necessary zoning, permits and rights of way, and furnishing the facilities.

3. I have been asked to estimate the cost of constructing a meeting place equivalent in size to the auditorium at West Springfield High School, together with 14 classrooms and half of an auxiliary gymnasium. The total area for this amount of space would be approximately 29,000 square feet. In addition, a certain amount of corridor space would be needed to provide access. We typically use a figure of approximately 33% to calculate the amount of such extra space. Accordingly, with a total space requirement of 38,600 square feet, and using a current figure of $67 per square foot (the average of our new construction and site work costs during the past three years), the cost of undertaking the construction and site work of such facilities would be approximately $2,586,200. The additional expense for architectural design, permits, engineering and interior furnishings mentioned above would be approximately $646,600.

4. The cost of purchasing land for construction purposes obviously varies considerably depending on the location of the proposed facility. If a new school were to be located within 3 miles of West Springfield High School, my office would estimate the land acquisition cost at between $200,000 and $250,000 per acre.

5. A school expected to accommodate 800 students would require a minimum of 13 acres. Applying the anticipated range of land acquisition costs, this would require an expenditure of between $2,600,000 and $3,250,000.

6. The *minimum* cost that would be associated with building a school containing the auditorium, 14 classrooms and auxiliary gym mentioned above, including land acquisition, construction, site work, and interior furnishings, would be approximately $5,832,800.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: July 9, 1992 /s/ Eugene J. Kelly

APPENDIX K

DECLARATION OF PEARL EVANS

February 15, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FAIRFAX COVENANT CHURCH,

Plaintiff,

v. CIVIL ACTION No. 92-743-A

FAIRFAX COUNTY SCHOOL BOARD,

Defendant.

I, Pearl Evans, state that the following facts are true to the best of my knowledge, information and belief:

1. I have been employed by the Fairfax County School Board as a Community Use Specialist, Office of Facilities Planning Services, since July 1975. I am also a custodian of the records in this Office which reflect the history of the rental of school facilities by church groups and other organizations. I have personal knowledge of the facts stated in this declaration.

Rent Paid by Fairfax Covenant Church

2. I have reviewed the February 1, 1993 affidavit submitted by Robert Hawkins on behalf of Fairfax Covenant Church. I do not contest the calculations shown on Exhibits "A" and "B" of his affidavit, reflecting the difference between the escalated rent paid by

Fairfax Covenant Church since May, 1987, and the rent if the non-commercial rate is now retrospectively applied. I also do not disagree with the computations shown for "miscellaneous" charges on Exhibit "C" to his affidavit, assuming that the non-commercial rate is retrospectively applied. Those fees reflect the escalated rates charged to Fairfax Covenant Church for its use of school facilities for religious purposes or religious functions in addition to its weekly worship services.

3. Using these figures, I have calculated the difference between the escalated rent paid by Fairfax Covenant Church for its use of school facilities since Sunday, June 3, 1990 (the earliest Sunday worship service, two-years preceding the May 28, 1992 filing of the Complaint in this case), and the amount of rent if the non-commercial rate is now applied retrospectively. That figure would be $195,304.20.

Other Long-Term Church Users

4. The current rental rate structure for churches and religious organizations was first instituted in 1982. I have computed the total amount of escalated rent that has been paid by long-term church users since 1987. (By "long-term church users," I mean churches and religious organizations that had been using school facilities for their regular, religious services for six years or longer, and that, therefore, began to pay the escalated rental rate in their sixth year of use). I was unable to compute the amounts of rent paid prior to 1987, because our official document retention policy provides for the destruction of those records after five years.

a. For the Fiscal Year 1988 ("FY," *i.e.*, July 1, 1987 through June 30, 1988), the difference between the escalated rent paid by long-term church users, and the rent if the non-commercial rate is now applied retrospectively, is approximately $137,371.

b. For FY 1989, the difference between the escalated rent paid by long-term church users, and the rent if the non-commercial rate is now applied retrospectively, is approximately $198,885.

c. For FY 1990, the difference between the escalated rent paid by long-term church users, and the rent if the non-commercial rate is now applied retrospectively, is approximately $231,244.

d. For FY 1991, the difference between the escalated rent paid by long-term church users, and the rent if the non-commercial rate is now applied retrospectively, is approximately $303,534.

e. For FY 1992, the difference between the escalated rent paid by long-term church users, and the rent if the non-commercial rate is now applied retrospectively, is approximately $186,516.

f. The difference between the escalated rent paid by long-term church users (*excluding* Fairfax Covenant Church), from January 1991 through January 1993, and the rent if the non-commercial rate is now applied retrospectively, is approximately $272,525. If, added to this amount, were the figure corresponding to the difference in rent paid by Fairfax Covenant Church for its use of school facilities during the two-years preceding the filing of its Complaint, $195,304.20 (see paragraph 3, above), the total would be $467,829.20.

g. The difference between the escalated rent paid by long-term church users (*including* Fairfax Covenant Church), and the rent if the applicable non-commercial rate is now applied retrospectively back to July 1, 1987, is approximately $1,157,700.

5. The number of non-church users that have paid the non-commercial rental rate to rent school facilities on a regular basis (i.e., averaging 12 or more times per year) has been, historically, quite small by comparison to the number of regular church users. Between 1982 and 1992, there were only between 7 and 9 such regular non-church users per year, most of which were colleges or universities that had rented school facilities for academic purposes.

By contrast, the number of regular church users per year during the same period has varied between 38 and 91.

6. Although I am unaware of how many other school systems in Virginia have adopted escalating rate structures for churches that rent public school facilities for religious purposes, I do know that Prince William County Public Schools has a rate structure quite similar to that used in Fairfax County. Prince William County Public Schools' Policies and Regulations are a matter of public record. Attached as Exhibit "1" is a true and accurate copy of Prince William County's Community Use Regulation 930-1.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 2/15/93 /s/ Pearl Evans

APPENDIX L

FAIRFAX COUNTY PUBLIC SCHOOLS

Regulation 8420
Facilities Services
July 1, 1986

GENERAL ADMINISTRATION

Local School Administration

Community Use of School Facilities

This regulation supersedes Regulation 1510.4.

I. PURPOSE

To establish the procedures and determine the conditions for community use of Fairfax County Public Schools (FCPS) buildings and grounds at operating school sites. (This regulation does not cover long-term leasing of surplus space, has limited applicability to the use of buildings and grounds at administrative centers, and does not offer open classrooms for use.)

II. CONDITIONS OF USE

A. Priority for Use of Facilities

The School Board shall assign highest priority for use of buildings and grounds to FCPS instructional programs, which include the Department of Vocational, Adult and Community Education, and student activities approved by the principal. Second priority shall be assigned to school-related groups, such as Parent-Teacher Associations, booster clubs, etc. Third priority shall be for tutoring of students at secondary schools. Fourth priority shall be given to the Department of Recreation and Community Services (see Attachment A).

When space is available at times that do not interfere with the previously stated priorities, school facilities may be scheduled for use by others, such as:

- youth groups (Scouts, 4-H, others)
- Fairfax County employee organizations
- cultural and civic groups
- colleges and universities
- churches
- state government agencies
- federal government agencies
- private organizations and individuals

B. Instructional Programs

The Department of Vocational, Adult and Community Education and the Department of Recreation and Community Services provide instructional and recreational programs. The first option for all such programs shall be given to the most appropriate of these departments. All applications for such use shall be forwarded to the coordinator, community use of facilities, who shall process the applications.

When the option to present an instructional or recreational program is not accepted by one of the departments referred to above, the application shall be returned to the coordinator, community use of facilities, who shall process the request.

C. Tutoring of Students

Parents may contract for private instruction for their children at secondary school facilities (by instructors other than Fairfax County Public Schools employees). No student shall be required to take part in such program(s). Instructors salaries for such programs shall not exceed the salary noted in the fee schedule. (See current notice.) A facilities-use application shall be completed for each program.

D. Colleges/Universities

Accredited courses of instruction offered by colleges and universities may be presented in school facilities upon approval of the coordinator, community use of school facilities. The determination of fees and billings for usage shall be by the coordinator, community use of school facilities.

E. Fund-Raising Activities

1. Nonprofit Provision

Groups claiming nonprofit status requesting the use of a Fairfax County public school may be required to provide a letter of determination from the Internal Revenue Service verifying their status. Groups having established their nonprofit status may sell merchandise in school facilities only to support or benefit Fairfax County programs.

2. Third Party Prohibition

The leasing of public property (e.g., buildings, grounds, table space, booth space, etc.) and/or the receipt of a token percentage of the sales price for merchandise sold by a third party shall not be approved for use of school facilities.

3. Selling of Merchandise Requirements

When the purpose of the usage is for selling merchandise (e.g., antique sales, bazaars, art sales, craft fairs, fun fairs, yard sales, and other selling activities), the application may be approved under one of the following conditions:

- User, nonprofit organization, will be the primary beneficiary from the sale of the merchandise by third parties.

- User, nonprofit organization, has taken title to the merchandise and will be the primary beneficiary from the sale of merchandise.

4. Provision for School Support Groups Selling Merchandise

Fairfax County Public Schools organizations and school supportive groups (PTAs, booster clubs, and others) having fund-raising activities (e.g., antique sales, bazaars, art sales, craft fairs, fun fairs, yard sales, and other selling activities) are also allowed to authorize the selling of merchandise by third parties. When third parties are involved a $15 registration fee shall be applicable; however, if the gross sales exceed $100, the total amount paid to the sponsoring organization shall be a 15 percent surcharge on gross sales.

F. Days and Hours of Usage

The use of school facilities shall be restricted to the days and hours listed below:

Days	Times Buildings May Be Used	Times Grounds May Be Used
Weekdays	Close of school day to 10:15 p.m.	Close of school day to sundown (Lighted fields close at 11 p.m.)
Saturdays	8:30 a.m. to 11:30 p.m.	8:30 a.m. to sundown (Lighted fields close at 11 p.m.)
Sundays	1 to 7 p.m.	1 to 7 p.m.
Holidays	Closed	Closed

Exceptions may be made to extend building use to 11:30 p.m. on weekdays when custodial overtime can be arranged. Special arrangements may also be made for churches to hold religious services at times other than those listed. Lighted athletic fields in close proximity to residential areas may be closed earlier.

G. Churches

Churches/religious organizations servicing Fairfax County citizens may be granted use of a school for as many as five years. Those desiring to establish a long-term use (other than one-time use) for church/religious organizations shall set up an appointment with the coordinator, community use of school facilities, for an orientation on procedures. Church/religious groups may be authorized usage after five years of use at increasing rental rates until the full commercial rates become effective in the ninth year of use. Only one church may have a contract for continuing use of a single school during any school year.

Principals may approve one-time use after telephone clearance with the coordinator, community use of school facilities.

H. Air-Conditioning/Heating of Facilities

Certain schools with zone temperature control shall be designated for use when air-conditioned/heated*** facilities are requested. Fees for air-conditioning/heating shall be published annually in a notice. The cost of operating the air-conditioning/heating varies in each school. When unusual circumstances occur, the school system may be able to arrange the use of facilities not designated at full cost to the user.

I. Employee Profit Prohibited

No employee of Fairfax County Public Schools shall use school facilities for personal profit. (See Policy 1801.)

*** An additional fee will be necessary when groups request settings above/below normal weekend and evening temperatures.

III. PROCEDURES FOR USE

A. Application for Facilities Use (Attachment B)

Facilities-use application forms are available in the principal's office of each school. Groups or individuals desiring use of school facilities must complete an application and submit it to the principal a minimum of 15 working days prior to the proposed event.

B. Fees for Facilities Use

Categories have been established to identify the types of users who may request FCPS facilities. The determination of rental fees, personnel fees, and special fees shall be made according to the category in which a user is placed and the personnel or special needs required to accommodate the event.

When a request to use school facilities is determined to be for the primary benefit of the school or the community, rental fees shall not be assessed. When a request to use school facilities is determined to be for the primary benefit of the user, rental fees may be assessed depending on the category into which a user is placed. Rental fees cover the use of basic equipment located in the rented area, such as chairs, desks, tables, etc., and are based on:

- the type of facility requested (cafeteria, auditorium, gymnasium, classroom, athletic field, etc.)
- the size of the facility requested
- the length of time the facility is used (hourly rates)

Only minimal personnel services, such as unlocking doors, turning on lights, and maintaining mechanical equipment are included in rental fees. The school principal or designee shall determine personnel needed to cover the school during a specific event. Users shall pay for personnel services required to:

- clean an area after use
- assist in school kitchen (cafeteria personnel must be paid if kitchen facilities are used)
- assist with lighting and audio equipment
- supervise large groups (staff supervisor may be assigned at the discretion of the principal)
- attend to the building during hours when the building is not in normal use (overtime)
- provide other services

Special fees shall be assessed for:

- use of stadium, stage, or playground lights
- use of kitchen utilities
- special trash pickups needed after an event

Special information is listed on the fee schedules in the current notice.

When current users request additional space, a new application form to replace the original shall be completed and submitted to the principal. The rental fee shall be adjusted according to the additional space used.

All fees must be made payable to the school at least four days prior to the scheduled event. When facilities are contracted for a series of events over several months, fees may be paid monthly. Users paying monthly fees must pay on or before the first working day of each month.

Private users or users who are not primarily Fairfax County residents shall be assessed rental fees listed on the fee schedule for private use (see current notice). All requests for use of facilities involving third party contracts, private use, or use to benefit nonresidents of Fairfax County shall be referred to the coordinator, community use of facilities who will coordinate arrangements with program managers, establish fees at com-

mercial rates, and approve applications. Approved applications will be returned to schools for collection of fees by check payable to the school.

The income shall be received as general revenue recorded in a separate account and used to the extent needed to offset the cost of making space available.

Upon signing the contract (ADM-20, Application for Community Use of School Facilities), the user of a facility acknowledges and agrees to a 10 percent penalty fee for late payment. In the event the collection of fees must be referred to an attorney, the user agrees to pay attorney fees, deemed to be 25 percent of the acknowledged fees. Situations involving the collection of penalties for late payment of fees, and/or fees referred for collection to an attorney, shall be coordinated and approved by the coordinator, community use of school facilities. The coordinator, community use of school facilities, shall provide instructions for disposition of penalty fees collected by school administrators.

FEE DETERMINATION CHART

USER CATEGORIES	RENTAL		PERSONNEL SERVICES	SPECIAL
	School or Community is Primary Beneficiary	User is Primary Beneficiary	Cafeteria Staff, Custodian, Staff Supervisor, Instructor, Maintenance/Student/ Sound Technician	Equipment or Utilities Services (e.g., field lights, spotlights, sound system, trash pickup and utilities)
1. FCPS student organization activities	No fee	No fee	Pay fee (for staff overtime only)	No fee[2]
2. School supportive groups (PTAs, boosters, others)	No fee	No fee	Pay fee (for staff overtime only)	No fee[2]
3. Private instruction for individual students at secondary schools	No fee	No fee	Pay fee[4]	Pay fee
4. Department of Recreation and Community Services	No fee	No fee	Pay fee[5]	Pay fee
5. County, city, town agencies	No fee	No fee	Pay fee[5]	Pay fee
6. Youth groups (Scouts, 4-H, others)	No fee	No fee[3]	Pay fee[5]	Pay fee
7. Fairfax County employee organizations	No fee	No fee[3]	Pay fee[6]	Pay fee
8. Cultural and civic groups	No fee	Pay fee[3]	Pay fee[4]	Pay fee
9. Colleges and universities	No fee	Pay fee[3]	Pay fee[6]	Pay fee
10. Churches*	No fee[1]	Pay fee[3]	Pay fee[4]	Pay fee
11. Commonwealth of Virginia agencies	No fee	Pay fee[4]	Pay fee[6]	Pay fee
12. Federal government agencies	No fee	Pay fee[4]	Pay fee[6]	Pay fee
13. Private	No fee	Pay fee[3]	Pay fee	Pay fee
14. Others	No fee	Pay fee[3]	Pay fee[6]	Pay fee

NOTES:

[1] Except for religious services or religious instruction.

[2] Except when activities are moved to another school.

[3] Apply regular fee schedule for fund-raising activities.

[4] Apply third-party fee schedule for fund-raising activities.

[5] Apply private-use fee schedule for all activities.

[6] Cleanup fees are mandatory when attendance exceeds 150.

* Dinners or social events, no rental fees. Personnel services and special fees are assessed when applicable.

C. Users' Responsibilities

All users shall accept responsibility for the care and maintenance of school facilities and agree to the conditions of use listed on the application form. Users shall obey public laws and School Board regulations when using school property. The person or organization who signs a contract shall be held financially liable for the contract provisions.

D. Principal's Responsibilities

The principal or designee shall:

1. Require all users of school facilities who are not a part of school academic or extracurricular programs to complete a facilities-use form. (Student activities that require personnel service fees must also complete an application form.)

2. Forward to the coordinator, community use of facilities, for approval, all application forms for groups required to pay commercial rental fees; for annual renewal of church contracts; and for contract review when the administrator of community use desires assistance. Also forward to the coordinator, community use of facilities, two copies (green and canary) of all other applications approved at the school level.

3. Retain a copy of all approved application forms in school files for three years for examination by school auditors.

4. See Principal's Checklist for Community Use of School Facilities. (Copies are available from the Community Use Section.)

IV. CANCELLATION OF CONTRACTS

The school division reserves the right to deny any application or cancel any contract when it deems such action to be in the best

interests of the school system. Following are examples of reasons why an application might be denied or cancelled:

A. The applicant has not demonstrated to the satisfaction of the school division that reasonable security and precautions have been provided .

B. School activities cancelled by emergencies need to be rescheduled.

C. The primary purpose of the usage is for the selling of merchandise (bazaars and antique shows where the authorized user is not the primary beneficiary).

D. Emergencies arise that require school use of facilities.

Use of school facilities shall be cancelled on any day that schools are closed due to inclement weather or other emergencies. Users shall be responsible for notifying their memberships.

V. INTERPRETING REGULATIONS

Problems and disagreements concerning the interpretation of policies and regulations regarding community use of school facilities shall be referred to the coordinator, community use of facilities. Disagreements not resolved by the coordinator, community use of facilities, shall be forwarded for resolution to the assistant superintendent, facilities services.

Attachments

SDL-1 FAIRFAX COUNTY
PUBLIC SCHOOLS

FAIRFAX COUNTY PUBLIC SCHOOLS

Notice 8420
Facilities Services –
Johnson
June 10, 1991

FACILITIES SERVICES

Leasing and Community Use of Facilities

Community Use of Facilities – FY 1992 Fee Schedules and Other Information

This notice is effective July 1, 1991, through June 30, 1992.

I. PURPOSE

To specify FY 1992 fees and other information related to Regulation 8420, "Community Use of School Facilities."

Questions concerning application of fees should be directed to the coordinator, community use of facilities, Department of Facilities Services.

II. FEE SCHEDULE CHARTS

Attached are fee schedules for FY 1992 specifying:

- rental fees for buildings and grounds (noncommercial rates)
- rental fees for commercial, third-party, private, or non resident use (commercial rates)
- personnel services fees
- special fees (e.g., equipment)

III. RENTAL FEES

All requests for use of facilities involving third-party contracts, private use, or use to benefit nonresidents of Fairfax County will be referred to the coordinator, community use of facilities, Department of Facilities Services (phone 246-3873). The Community Use Section will coordinate arrangements with principals, establish fees at commercial rates, and approve applications. Approved applications will be returned to schools for use in collecting fees, which are to be remitted by check, payable to the host school, at least 4 working days prior to the use date.

Fees will be forwarded to the Department of Financial Services in accordance with Regulation 5930.2, "Remittance of Fees for Use of School Facilities." Schools are authorized to retain 10 percent of rental fees collected. The resulting funds are to be placed in either the school activity account or the administrative account. City of Fairfax schools are directed to remit, to the City of Fairfax, 70 percent of commercial fees collected.

FY 1992 rental fees have been adjusted for an inflation increase of 6.3 percent above FY 1991 levels. Air conditioning and heating fees are included in the rental fees.

Organizations that do not pay rental fees, but that do require air conditioning or heat on weekends or holidays, or after the thermostat setback time during the week, shall be assessed 50 percent of the rental fees indicated on chart A for such service.

IV. PERSONNEL SERVICES FEES

Overtime hours for personnel services charged a user should approximate the work hours required, plus one hour for opening and closing, except for mandatory overtime minimums (see Regulation 4660.2). The attached fee schedules provide a list of cleanup fees. If the user requests that a facility be rearranged to meet specific needs, the additional time required to both

rearrange and return the facility to its normal status will be charged to the user.

It is the responsibility of the principal to ensure that fees collected and forwarded to the Department of Financial Services can be reconciled with time reports.

Wages to be paid for services in support of community use of schools are specified in Notice 4630, "Payment of Personnel Supporting Community Use of School Facilities," issued annually.

V. SPECIAL FEES

A. Kitchens may be rented through the principal's approval of an application for use of the cafeteria. Because of the high risk involved, food service employees (preferably from the school involved) must be engaged in advance and be present during the activity. A service charge will be collected for the use of kitchen equipment and utilities.

B. Stage lights and spotlights may be rented, provided a technician approved by the principal is engaged by the user.

C. Police supervision for an activity may be required at the discretion of the principal. Any fees for police services billed to the school will be paid by the user in accordance with the provisions of paragraph 3-03.11b, School Activity Funds Manual.

VI. PERSONNEL SERVICE CREDITS

Regulation 5930.2 provides guidance on crediting a school's personnel service account for the value of personnel hours authorized monthly in support of community use.

When a school's personnel service credit account has a fund balance at the end of the fiscal year, the school will be allowed

to carry over the dollar value of custodial fees, up to the equivalent of 50 hours at FY 1992 rates.

Principals may use personnel service credits flexibly to benefit students through the efficient management of the facility.

Expenditures funded by personnel service credits are to be submitted on a form ADM-20, with backup copies kept for audit purposes.

VII. USE OF GYMNASIUMS

The Department of Recreation and Community Services (DRCS) has responsibility for scheduling community use of gymnasiums during the entire year, subject to the provisions of Regulation 8420, with school activities having first priority.

Schools are informed by Notice 8421 each fall of the dates by which their winter schedules for gymnasiums are to be submitted.

The Department of Recreation and Community Services (DRCS) schedules gymnasium use by community groups after determining the availability of the facilities with principals. DRCS assesses and collects fees for supervision and custodial services. During this period, schools may accept applications on form ADM-20 for community use of their gymnasiums. All copies of the applications (with recommendations for approval) are to be forwarded to the DRCS for action.

VIII. APPLICATION FORM

Form ADM-20, "Application for Community Use of School Facilities" (revised 7/87), may be obtained from the Office of Records Management, Department of Management Services (telephone 960-6000).

Reference: Regulation 8420, Community Use of School Facilities
Regulation 5930.2, Remittance of Fees for Use of School Facilities
Regulation 4630, Payment of Personnel Supporting Community Use of School Facilities
Notice 4630, Payment of Personnel Supporting Community Use of School Facilities

Attachment

SDL-1
SDL-X Finance secretary, each school
Community Use Section (500)

FAIRFAX COUNTY PUBLIC SCHOOLS

Attachment
Notice 8420
June 10, 1991

FEE SCHEDULE CHARTS

I. **RENTAL FEES** - Hourly Rates

A. **NONCOMMERCIAL RATES**

1. **CAFETERIA (MULTIPURPOSE ROOMS)**

Square Footage	3,999 or Less		4,000 to 7,999		8,000 to 11,999		12,000 or More	
	w/o kitchen	with kitchen	w/o kitchen	with kitchen	w/o kitchen	with kitchen	w/o kitchen	with kitchen
Rental (per hr)	$25.40	39.50	35.70	59.70	69.60	119.40	128.60	223.80
Custodial Cleanup Fees	$44.00	66.00	55.00	77.00	88.00	132.00	110.00	154.00

2. **GYMNASIUMS AND AUXILIARY GYMS**

Square Footage	4,499 or Less	4,500 to 8,999	9,000 to 16,999	17,000 or More
Rental (per hour)	$25.40	45.00	85.10	163.90
		Without Showers		
Custodial Cleanup Fees	$22.00	44.00	66.00	132.00
		With Showers		
	$33.00	66.00	88.00	176.00

3. **AUDITORIUMS***

Seating Capacity	399 or Less	400 to 699	700 to 1,099	1,100 or More
Rental (per hour)	$25.40	35.70	49.60	64.90
Custodial Cleanup Fees	$44.00	66.00	110.00	132.00

* Fee for dressing room is the same as fee for a classroom.

4. **CLASSROOMS**

Rental (each per hour)	$5.30
Custodial Cleanup Fees	$11.00

5. **ATHLETIC FIELDS**

	Football	Baseball
Rental (per hour)	$542.40	270.50
Custodial Cleanup Fees	$308.00	154.00

6. **PARKING LOT***

$6.80
$22.00

*Outside activities

NOTE: Charges will be for hourly amounts only.

Schools are authorized to transfer 10 percent of rental fees collected to the school activity fund account or to the school administrative account.

Organizations not paying rental fees, requiring air conditioning or heat on weekends or holidays, shall be assessed 50 percent of the rental fees indicated on chart 1 for such service.

B. **COMMERCIAL RATES** (Includes Third-Party Contract Uses, Private Use, or Use to Benefit Nonresidents of Fairfax County)

1. **CAFETERIA (MULTIPURPOSE ROOMS)**

Square Footage	3,999 or Less		4,000 to 7,999		8,000 to 11,999		12,000 or More	
	w/o kitchen	with kitchen	w/o kitchen	with kitchen	w/o kitchen	with kitchen	w/o kitchen	with kitchen
Rental (per hr)	$127.00	197.50	178.50	298.50	348.00	597.00	643.00	1,119.00
Custodial Cleanup Fees	$44.00	66.00	55.00	77.00	88.00	132.00	110.00	154.00

2. **GYMNASIUMS AND AUXILIARY GYMS**

Square Footage	4,499 or Less	4,500 to 8,999	9,000 to 16,999	17,000 or More
Rental (per hour)	$127.00	225.00	425.50	819.50
		Without Showers		
Custodial Cleanup Fees	$22.00	44.00	66.00	132.00
		With Showers		
	$33.00	66.00	88.00	176.00

3. **AUDITORIUMS***

Seating Capacity	399 or Less	400 to 699	700 to 1,099	1,100 or More
Rental (per hour)	$127.00	178.50	248.00	324.50
Custodial Cleanup Fees	$44.00	66.00	110.00	132.00

*Fee for dressing room is the same as fee for a classroom.

4. **CLASSROOMS**

Rental (each per hour)	$26.50
Custodial Cleanup Fees	$11.00

5. **ATHLETIC FIELDS**

	Football	Baseball	
Rental (per hour)	$2,712.00	1,352.50	$34.00
Custodial Cleanup Fees	$308.00	154.00	22.00

6. **PARKING LOT***

*Outside Activities

NOTE: Charges will be for hourly amounts only.

Schools are authorized to transfer 10 percent of rental fees collected to the school activities account fund or to the school administrative account.

Organizations not paying rental fees, requiring air conditioning or heat on weekends or holidays, shall be assessed 50 percent of rental fees indicated on chart 1 for such service.

II. **PERSONNEL SERVICE FEES** - Hourly Rates

Category	Fees
Activity supervisor	$ 9.40
Cafeteria staff	18.60
Custodian	22.00
Faculty or administrative supervisor	27.30
School finance officer	19.10
Instructor tutoring students (not to exceed)	27.30
Maintenance technician	24.30
Secretary	19.10
Sound technician (School Board Room)	25.10
Student technician	7.40

III. SPECIAL FEES - Hourly Rates

A. Forward fees for the following to the Department of Financial Services

	Fees
Field lights	
Football	$145.40
Baseball	59.00
Kitchen equipment and utilities	11.50

B. Fees to be retained by school

Self-contained sound system	
Outdoor system (amplifier, one microphone, and two speakers)	34.10
Indoor system (one microphone)	8.70
Additional speakers or mikes	5.70
Spotlights	21.00
Stage lights	5.60
TV and VCR	22.50
35 mm projector	16.90
Slide projector	16.90
Overhead projector	16.90
Tape recording equipment	10.30
Magnetic tape, 7" diameter, 1,200 feet	5.20
Special trash removal	43.70 each pickup

NOTE: Charges will be for hourly amounts only.

Equipment or services will not be provided to users without a fee. Special fees other than those listed above may be assessed with the authorization of the coordinator, community use of facilities. Generally, the rental of specialized equipment is not recommended.

Out-of-pocket costs, not listed in B. above, incurred in providing the services for which special fees are assessed after coordination with the Community Use Section, may be retained by the school. Funds collected from rental of equipment listed or not listed in B. above must be used for replacement or repair of special equipment and must be supported by evidence of expenditures; e.g., invoices or bills.

APPENDIX M

ANNUAL CONTRACT

Fairfax County Public Schools 11TH YEAR RENEWAL

APPLICATION FOR COMMUNITY USE OF SCHOOL FACILITIES

MAY 1992 – APRIL 1993

All information must be furnished before application can be processed. Fees must be paid four working days prior to scheduled event. Make check payable to the school. Application must be filed with the school principal not less than 15 working days before intended use.

1. School Requested (name) West Springfield H.S.

2. Activity Date(s) Building to Open: Closed
Sundays 8 a.m. ___ p.m. ___ a.m. 1 p.m.

3. Individual/Organization Fairfax Covenant Church

Address 9689 Main Street, Suite D, Fairfax, VA 22031
(street) (county/city) (zip code)

Phone 764-1862 815-2863
(office) (home)

4. Type of Activity Church Services

5. Will you attend? YES

6. Name of chaperons (one required for each 25 children) who have agreed to supervise this activity (list two): N/A

7. Is organization a nonprofit type? YES

8. Does individual/organization have liability insurance coverage?
YES (see ins. cert.)

9. Is there a third-party contract/arrangement with a profit-making individual/organization? NO

10. Does the user collect fees? NO
Admission: Adults $___ Children $___ Couples $___ Dues:
Monthly $___ Annual $___
Donations $___ Advertisement $___
Others (specify) $ Donations/offerings only

11. Number of people projected to attend 800

12. Requirements (specify):

RENTAL		SPECIAL PERSONNEL		EQUIPMENT/SERVICE
Auditorium	X	Activities Supv.	___	
Cafeteria	___	Cafeteria Staff	___	
Cafeteria w/Kitchen	___	Custodian	___	
Classroom(s)	14	Faculty Supv.	X	
Gymnasium	Aux (1/2)	Financial Clerk	___	
		Maintenance Technician	___	
Other	___	Secretary	___	
		Sound Tech.	___	
		Student Tech.	___	

13. Comments

See attached Schedule of rooms and times

The undersigned certifies that he or she is familiar with, and will abide by, current FCPS Regulation 8420, Community Use of School Facilities, and the requirements for users of school facilities listed on the reverse side of this application form. The undersigned shall be held liable for any and all damages to School Board property by user, and for the prompt and proper settlement of claims for such damages and agrees to pay applicable fees set forth above.

James R. Hawkins Business Manager 3/10/92
(signature) (position) (date)

*Not applicable for individuals. NOTE: When schools are closed because of inclement weather, all facilities use is cancelled. Users are responsible for notifying their memberships.

CALCULATION OF FEES BY SCHOOL PERSONNEL

1. Rental

	No.	x	Hrs.	x	Fee	=	$
a. Auditorium							
b. Cafeteria							
c. Cafeteria W/Kitchen							
d. Classroom(s)							
e. Gymnasium							
f. Other							

CHURCH WILL BE BILLED MONTHLY IN ADVANCE, BY SCHOOL, IN COMPLIANCE WITH FEES LISTED IN CURRENT NOTICE 8420.

Subtotal $ ___

2. Personnel

	No.	x	Hrs.	x	Fee	=	$
a. Activities Supervisor							
b. Cafeteria Staff							
c. Custodian							
d. Faculty Supervisor							
e. Financial Clerk							
f. Maintenance Technician							
g. Secretary							
h. Sound Technician							
i. Student Technician							
j. Service/Cleanup							
k. Other							

FEES ARE PAYABLE TO SCHOOL, ONE MONTH IN ADVANCE. ANY ADJUSTMENT TO BILLING WILL BE MADE ON THE NEXT MONTH'S BILLING.

Subtotal $ ___

3. Special Fees

	No.	x	Hrs.	x	Fee	=	$
a.							
b.							
c.							
d.							

Subtotal $ ___
Total $ ___
Late payment penalty fee 10% $ ___
Attorney fee for collection 25% $ ___
Total $ ___

FEES ARE SUBJECT TO CHANGE

4. IRS Letter Submitted? ___ Yes ___ No Attached ___

5. Liability Insurance Policy? ___ Yes ___ No

Attached ___ Amount $ ___

Comments

THIS ANNUAL CONTRACT IS VALID FROM MAY 1992 THROUGH APRIL 1993. IRS LETTER IS ON FILE. INSURANCE CERTIFICATE IS VALID UNTIL 8/93.

OFFICE USE

From: School
X Approved ___ Approval Recommended ___ Disapproved

(signature of principal) (date)

To: Coordinator, Community Use of Facilities
X Approved ___ Disapproved

James M. Plutte 4/17/92
(signature of coordinator) (date)

BEST AVAILABLE COPY

[attachment to Fairfax Covenant Church contract]

WEST SPRINGFIELD HIGH SCHOOL 4/92
ROOM REQUIREMENTS

Room #	Use	Hours of Use
Auditorium (174)	Main Meeting	3 hours
200	Nursing Mothers	2 hours
242A & B (divider open)	4 year olds	1 hour
239	3 year olds	1 hour
243B	Prayer Counselors	1 hour
275, 276, 243A	1 year olds Nursery	1 hour
122A	UCLS Class, Trailblazers, and Breakthrough	2 hours
121 & 122B	2 year olds	1 hour
120	UCLS Childcare and $ counters	1 hour
120A	New Comers Reception	1 hour
102	8 - 10 year olds	1 hour
139(1/2)	5 - 7 year olds	1 hour

APPENDIX N

STATES LIMITING USE OF PUBLIC SCHOOL FACILITIES FOR RELIGIOUS PURPOSES

ALASKA:

Alaska O.A.G. F66-138-82, 1982 WL 43802 (Mar. 11, 1982) (ruling that religious association's "application for the lease of State land at a price below fair market value should be denied."); Alaska O.A.G. No. 3 at p.3 (April 22, 1966) (approving of occasional use of school facilities by private religious groups, but ruling that "the school board would be limited to the extent that the established fees for the use of school buildings could not be so far below market value as to result in "direct benefit' to a religious group.").

ARIZONA:

Pratt v. Arizona Bd. of Regents, 520 P.2d 514, 517 (Ariz. 1974) (*en banc*) (holding that a lease of a public football stadium for religious service did not violate religion clauses in state constitution, where the lease was at a fair rental rate and was made only on occasional basis); 1987 Arizona O.A.G. 54, 1987 WL 121394 (Feb. 18, 1987) (upholding lease of unused school property to churches for periods not exceeding five years, provided fair rental value is obtained); Arizona O.A.G. No. 179-073, 1979 WL 23142 (Mar. 8, 1979) (ruling that "the use of school facilities by outside religious groups is proper so long as: ... [r]eligious groups only make occasional or temporary use of school property (A.G.O. 75-6). We would add the requirement that the school charge a reasonable use fee in most cases. . . .").

CALIFORNIA:

CAL. EDUC. CODE §§ 40041, 40043 (West 1993 and Supp. 1994) (permitting schools to charge no more than actual

cost to organizations associated with youth and school activities, but requiring schools to charge an amount "at least equal to the district's costs" for use by religious organizations on a temporary basis if they have no other place to meet, and requiring "fair rental value" to be charged to groups holding meetings where contributions are solicited); 76 California O.A.G. 52, 1993 WL 122644 (1993) (approving constitutionality of CAL. EDUC. CODE §§ 40041, 40043, noting "there may be narrow yet compelling reasons supporting section 40041's tiered approach. For example, by charging for the direct cost for facility use, the state avoids any claim it is making an impermissible gift to religion. By limiting use to unhoused sects the government avoids permanent institutionalization of religious use within a given school facility. Such an occurrence might allow one to reasonably infer the state has placed its imprimatur on a particular religion.").

FLORIDA:

Southside Estates Baptist Church v. Board of Trustees, 115 So. 2d 697, 700 (Fla. 1959) (chancellor properly dismissed complaint attacking church's temporary use of school facilities during non-school hours, where the record did not show that any public funds were involved); *O'Hara v. School Bd.*, 432 So. 2d 1356, 1358 (Fla. Dist. Ct. App. 1983) (*following Southside Estates*, permitting school board to rent school facilities to church groups at cost, during non-school hours and on a temporary basis).

ILLINOIS:

ILL. ANN. STAT. ch. 105, para. 5/10-22.10 (Smith-Hurd 1993) (permitting temporary use of public school facilities for Sunday school and religious meetings); *Nichols v. School Directors*, 93 Ill. 61 (1879) (upholding temporary use of school facilities by religious organizations).

IOWA:

Davis v. Boget, 50 Iowa 11, 15-16 (1878) (holding that the use of a public school by religious groups on an occasional and temporary basis did not violate the state Establishment Clause); Iowa O.A.G. No. 80-1-2, 1980 WL 25904 (Jan. 3. 1980) (upholding lease of National Guard chapel for religious purposes, but "only on a temporary or irregular basis and at a fair rental value. . . ."); 1965 Iowa O.A.G. 272, 275 (June 14, 1965) (ruling that a lease of unused school property to a parochial school for one year for adequate consideration would not violate the federal or state establishment clauses, *following Davis v. Boget*); *but see* Iowa O.A.G. No. 82-4-17, 1982 WL 42728 (April 29, 1982) (opining that, under *Widmar*, school facilities made available to secular groups would have to be made available "on an equal footing with other groups," without addressing long-term use or rent issues).

MAINE:

Maine O.A.G. No. 80-43 (Feb. 22, 1980), *available in* WESTLAW (Me-Ag) ("In view of the fact that the church will pay a fair rental value for its use of the school building, such use will not involve an expenditure of public funds for a religious activity. . . . Additionally, given the temporary and occasional nature of the use of the school building by [the church], there is no danger that a publicly supported structure will become a permanent place of worship.").

MISSISSIPPI:

Miss. Code Ann. § 37-7-473 (1990) (permitting sale or lease of school property to any group of persons "to be used for church purposes."); Mississippi O.A.G. (May 9, 1984), *available in* WESTLAW (Ms-Ag) (permitting use

of school facilities "on a temporary basis during times of emergency" by churches whose facilities were destroyed or badly damaged in a tornado).

MISSOURI:

Missouri O.A.G. No. 82 (Marshall) (Sep. 2, 1970) (ruling that school district is authorized to allow use of school premises by church or religious organization for religious purposes during times when the use for school purposes is not required, provided that fair and adequate consideration is received for its use).

NEBRASKA:

State ex rel. Gilbert v. Dilley, 145 N.W. 999, 999-1000 (Neb. 1914) (holding that the occasional use of schools for private religious purposes no more than 4 times a year for 5 years did not violate the State Establishment Clause, noting that the result would be different "if the schoolhouse had been used for religious meetings to such an extent as to make it a place of worship. . . .").

NEVADA:

Wallace v. Washoe County Sch. Dist., 701 F. Supp. 187, 191 (D. Nev. 1988) (denying preliminary injunction to church seeking to use school facilities on a permanent basis, ruling that "there is no suggestion in *Widmar* that the decision should be broadly interpreted to encompass a situation similar to the one at bar in which [the church] seeks to use the school's "public forum" policy as a basis for commencing regular and permanent church services at the McQueen High School."); Nevada O.A.G. No. 93-2, 1993 WL 361739 (Mar. 16, 1993) (upholding private use of school facilities for occasional worship services during non-school hours at cost).

NEW JERSEY:

Resnick v. East Brunswick Township Bd. of Educ., 389 A.2d 944, 960 (N.J. Sup. Ct. 1978) ("[R]eligious groups who fully reimburse school boards for related out-of-pocket expenses may use school facilities on a temporary basis for religious services. . . .").

NEW MEXICO:

1963-64 New Mexico O.A.G. 630-106 (ruling that, since a school district may not in any manner lend its financial or other support to any private religious denominations, it is incumbent upon such authorities to obtain reimbursement for any actual expenses occasioned from a religious group's private use of public school facilities).

NEW YORK:

N.Y. EDUC. LAW § 414 (McKinney 1988 & Supp. 1994) (authorizing use of school facilities for civic purposes, but not providing for use by religious organizations); *Deeper Life Christian Fellowship v. Sobol*, 948 F.2d 79, 83 (2d Cir. 1991) (holding that N.Y. EDUC. LAW § 414 would not permit the use of public school auditoriums for church worship services); *see Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2144 & n.2 (1993) (noting that the church had not challenged the decision of the school district denying it permission to use school facilities for Sunday morning services and Sunday school, so that "the validity of this denial is not before us.").

PENNSYLVANIA:

Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1369, 1372 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990) (holding that religious youth organization should be permitted to pay a fee to rent Pennsylvania public school facilities, although the religious organization did not challenge the school system's policy permitting civic and cultural groups to use school facilities at no charge, while requiring private and non-school-related organizations to pay the fee); 1957

Pennsylvania O.A.G. No. 5 (Sept. 12, 1957) (authorizing "school district to lease, for a reasonable term at a fair consideration, an unused public school building to a religious group for parochial school use.").

SOUTH CAROLINA:

1990 South Carolina O.A.G. No. 90-21, 1990 WL 482409 (Feb. 21, 1990) ("[U]nder the Establishment Clause, a school district could lawfully permit a church to use school property on Sundays provided that such usage did not conflict with school purposes and provided that the public facility was not a substitute for a permanent religious facility. . . .").

TEXAS:

Texas O.A.G. No. 0-5354 at 11 (July 14, 1943) (ruling that, under state constitutional provisions concerning church and state, "a board of trustees is not authorized to permit the use of school property for sectarian purposes unless reasonable consideration is received for such use.").

VIRGINIA:

1990 Virginia O.A.G. 213, 1990 WL 511510 (upholding constitutionality of Fairfax County Public Schools Regulation 8420, permitting long-term use of public schools by churches at a commercial rental rate); *see* Appendix F.

WASHINGTON:

1978 Washington O.A.G. No. 10, 1978 WL 23890 (Apr. 17, 1978) (ruling that school property may be leased to religious groups provided that rent encompasses fair market value of property and the rented property is sufficiently remote from other property being retained for school purposes to avoid the appearance of official endorsement of religious activities).

WISCONSIN:

Wis. Stat. Ann. § 120.12(10) (West 1991) (requiring access to public school facilities "free of charge" by nonsectarian and nonpartisan "citizen associations"); *id.*, § 120.13(17) (permitting churches to use public school facilities on a temporary basis if they pay a reasonable rental fee); 63 Wisconsin O.A.G. 374, 383 (1974) (approving temporary lease of university facilities to religious congregation at a reasonable rental).

Supreme Court, U.S.
FILED
MAY 16 1994
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No. 93-1752

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FAIRFAX COUNTY SCHOOL BOARD,
Petitioner,

v.

FAIRFAX COVENANT CHURCH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1) Whether the School Board's rental policy that charges only religious groups an escalating rental rate for use of the School Board's facilities during nonschool hours is a content-based requirement that violates the Church's rights under the Free Speech Clause and the Free Exercise Clause?

2) Whether the School Board's 1982 rental policy that charges only religious groups an escalating rental rate for use of the School Board's facilities during nonschool hours violates the Establishment Clause because it treats religious groups worse than other community groups renting the facilities?

2) Whether the Fourth Circuit correctly ruled that this case does not present the issue of whether the district court should grant "prospective relief only" under *Chevron Oil v. Huson*, 404 U.S. 97 (1971)?

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STATEMENT OF THE CASE

Fairfax County School Board ("School Board") operates 172 school buildings in northern Virginia and has an annual operating budget of over $850 million a year. The School Board opens its buildings for meetings by community groups during nonschool hours. During 1991, the School Board received about 8500 applications from groups and individuals to meet in the school facilities. Some of these applications were multiple ones from the same group, and many of the applications were from school-related groups. Religious groups also meet there. In 1992, 51 churches were meeting in the schools. Over the ten year period before the litigation, the number of religious groups meeting in the schools has varied from 38 to 91.

Regulation 8420 is the School Board's policy governing community use of school facilities. Regulation 8420 allows a broad range of community groups to meet in the schools, including (Cert. Pet. at 60a):

- youth groups (Scouts, 4-H, others)
- Fairfax County employee organizations
- cultural and civic groups
- colleges and universities
- churches
- state government agencies
- federal government agencies
- private organizations and individuals

The School Board allows these various groups to meet regularly in the school buildings on a long term, multi-year basis. For example, a large number of Boy Scouts troops have met at School Board buildings for approximately 80 years (Cert. Pet. at 3a).

A wide variety of community groups meet in the Fairfax County schools. By School Board Regulation 8420, many of them pay no rent at all. Other groups pay a rental rate that covers all of the school district's expenses related to renting the facilities. The School Board's Regulation 8420 singles out churches and religious groups, and charges them an escalating rental rate based on how long they have met in the public schools.

The Standard Operating Procedure for Community Use of School Facilities -- Church/Religious Organizations spells out the disparate fee schedule for religious groups more precisely:

First five years of use	pay regular fee schedule
6th year of church use	pay two times the regular fee schedule
7th year of church use	pay three times the regular fee schedule
8th year of church use	pay four times the regular fee schedule
9th year of church use and thereafter	pay five times the regular fee schedule

Fairfax Covenant Church ("Church") is an evangelical Christian church that has met in various Fairfax County school buildings for approximately 12 years. It is currently constructing a building (Cert. Pet. at 5a). The Church filed a lawsuit under 42 U.S.C. §1983 challenging the constitutionality of the policy as well as seeking $287,456.60 in back rental overpayments.

The district court ruled that the rental rate policy violated the First Amendment, but ruled that the Church could not recover damages because of this Court's decision in *Chevron Oil v. Huson,* 404 U.S. 97 (1971). *Fairfax Covenant Church v. Fairfax County School Board*, 811 F.Supp. 1137 (E.D. 1993); Cert. Pet. at 20a. Both sides cross-appealed to the Fourth Circuit.

A unanimous panel agreed with the district court that the disparate rental rates for religious groups violated the First Amendment. *Fairfax Covenant Church v. Fairfax County School Board*, 17 F.3d 703 (4th Cir. 1994); Cert. Pet. at 1a. The Fourth Circuit, however, reversed the district court on the *Chevron Oil* issue and said the case did not present a new rule of law, which is necessary to trigger the *Chevron Oil* analysis. The Fourth Circuit said, "we are satisfied, as was the district court, that the holding in *Widmar*, a 1981 decision, unremarkably controls the decision here and that the district court did not establish a new principle." Cert. Pet. at 13a; 17 F.3d at 710. The School Board has sought this Court's review of the Fourth Circuit's decision.

I.

THE FOURTH CIRCUIT'S OPINION CORRECTLY APPLIED THIS COURT'S PRECEDENTS TO THIS CASE

A. The Lower Courts Correctly Applied *Widmar v. Vincent* to this Case.

The Fourth Circuit and the district court correctly relied upon this Court's decision in *Widmar v. Vincent,* 454 U.S. 263 (1981) to rule that Fairfax County School Board

violated the Free Speech Clause and the Free Exercise Clause of the First Amendment with its content-based policy of charging religious groups an escalating rental rate to meet after hours in school buildings, while allowing other community groups to pay a lower rental fee. The Fourth Circuit said that *Widmar* "unremarkably controls" the decision in this case. The School Board operates a public forum opened to a wide variety of community groups by both policy and practice. Yet, it singles out churches and other religious groups to pay an onerous financial burden based solely upon the content of the churches' speech.

As the Fourth Circuit ruled, "[w]e can find no basis to distinguish the circumstances essential to the Court's holding in *Widmar* from those of record here." Cert. Pet. at 8a; 17 F.3d at 707. In *Widmar*, this Court ruled that the University of Missouri could not prohibit a Christian student group from meeting on campus for worship services, as it had done weekly for four years, because the university allowed virtually all other student groups to meet on campus.

In *Widmar* this Court stated the general rule of "equal access" -- that is, that the government must treat religious groups the same as all other groups in the terms or conditions for access to meet in a facility generally open to the public. This Court in *Widmar* said that content-based exclusions from an open forum triggers review under the Free Speech Clause's compelling state interest test. *Widmar*, 454 U.S. at 270. In this case, the Fourth Circuit correctly found that there was no meaningful constitutional distinction between a policy that banned religious meetings and a policy

that subjected religious meetings to unique financial burdens.[1]

B. *Widmar* Upheld Weekly Church Use of an Open Forum for Worship Services over a Multi-year Period of Time.

The School Board urges this Court to review the Fourth Circuit's decision by wrongly asserting that a government entity would violate the Establishment Clause if it allowed a religious group to meet weekly in an open forum for a long period of time at the same rent charged all other community groups. This Court has already addressed that very issue in *Widmar v. Vincent*, and rejected the same arguments then that the School Board raises now. The facts of this case are indistinguishable from those in *Widmar*.

In *Widmar*, this Court ruled that there was no Establishment Clause violation for a student religious group to meet weekly for worship services for four years. In fact, this Court ruled that the government would violate the Free Speech Clause if it banned only religious groups from using an open forum when it allowed all other groups to meet there.

---

[1] The School Board's disparate rental policy also violates the Church's First Amendment right to be free of content-based financial burdens. This Court has repeatedly condemned content-based financial burdens on expressive activity as violating the Free Speech Clause. *See Forsyth County v. Nationalist Movement*, 120 L.Ed.2d 101 (1992); *Simon & Schuster v. Crime Victims Board*, 116 L.Ed.2d 476 (1991); *Leathers v. Medlock*, 499 U.S. 439 (1991) and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987). The School Board's policy also violates the Free Exercise Clause. The Church raised these arguments to both the Fourth Circuit and the district court. The Church renews both of these arguments before this Court.

This Court said that the students' meetings in *Widmar* contained religious worship:

> A typical Cornerstone meeting included prayer, hymns, Bible commentary and discussion of religious views and experiences.

454 U.S. at 265, n.2.

These student worship meetings occurred weekly for four years before they were banned by university officials, according to the Eighth Circuit's lower court opinion in *Widmar*. In *Chess v. Widmar*, 635 F.2d 1310 (8th Cir. 1980), the Eighth Circuit said:

> From 1973 until 1977, Cornerstone sought and obtained permission to use University facilities for its ***weekly*** meetings and events.

635 F.2d at 1313 (emphasis added).

This Court held in *Widmar* that there is no Establishment Clause violation when a church uses an open forum for a multi-year period for weekly worship services. This Court said that "an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices ...." *Widmar,* 454 U.S. at 274. The main reason there is no Establishment Clause violation is because "the forum is available to a broad class of nonreligious as well as religious speakers ...." *Id.*

The facts in this case parallel those of *Widmar*. Fairfax Covenant Church meets weekly for Sunday morning worship services at the School Board's open forum. The Church has met weekly for a number of years. Many secular

groups have been allowed to meet weekly for meetings over many years (80 years for the Boy Scouts). *Widmar* says that in such a situation, the School Board must allow religious groups to meet on the same terms and conditions as other community groups.[2]

Therefore, there is no Establishment Clause violation when a church uses an open forum for worship services on the same terms and conditions as other community groups use the open forum. This Court repeated that holding in *Board of Education v. Mergens,* 496 U.S. 226 (1990) and last term in *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. ___, 124 L.Ed.2d 352 (1993). The Fourth Circuit correctly applied the law in this case, ruling that the School Board violated the Church's free speech rights and right to free exercise of religion. There is no need for this Court to review that decision.

---

[2] The School Board wrongly argues that it is still an open question whether it violates the Establishment Clause for a religious group to use an open forum on a long term basis. The School Board refers to footnote 2 in *Lamb's Chapel* which describes how the church had sought permission to hold its Sunday morning worship services at one of the schools, and permission was denied. The footnote ends, "The Church did not challenge this denial in the courts and the validity of this denial is not before us." 124 L.Ed.2d at 358, n.2. The School Board reads too much into this footnote. It does not say, "this issue has never been ruled on by this Court;" it simply states that the issue is not raised in this case. The specific issue of a church using an open forum on a weekly basis for a multi-year period was decided in *Widmar v. Vincent.* Footnote 2 in *Lamb's Chapel* does not contradict or overrule the holding of *Widmar.*

II.

THIS COURT HAS REPEATEDLY REJECTED THE "FINANCIAL SUBSIDY TO CHURCHES" ARGUMENT THAT THE SCHOOL BOARD RAISES ANEW IN THIS CASE

A. There Is No Government Subsidy In This Case.

The School Board argues incorrectly that the Church would receive a "financial subsidy" from the government in violation of the Establishment Clause if the Church paid the same rent as all other community groups. The School Board bases its "direct subsidy" Establishment Clause argument on a defective and abstract concept. The School Board points out that even the higher rates a church pays to use the school buildings is less than a church would pay if it rented a private building on the open market, or constructed its own building. The difference between this market rate and the School Board's rental rate, according to the School Board, is a "government subsidy" that raises Establishment Clause concerns. This argument is simply wrong.

First, the "government subsidy of religion" argument is wrong because in this case the Church receives no government money, assets or property at all. Churches receive nothing more than temporary access to meet in a building that remains under the full control of the School Board. The only money that changes hands in this case is the Church paying extra rent to the School Board to meet in the school buildings during nonschool hours.

Second, the School Board admits that the noncommercial (lower) rate covers all of the School Board's expenses. (Cert. Pet. at 44a). From the School Board's

perspective, it is giving nothing to the groups who pay the noncommercial rate. There is no government "subsidy" here. In fact, the extra rent paid by the churches is pure profit to the School Board.[3]

It is a strange argument that treating churches the same as all other groups violates the Constitution, so churches must be treated worse than other community groups. The district court made a clear-cut statement filled with common sense when it said:

> Treating churches the same as everyone else, which Fairfax County School Board easily could do, cannot be viewed as treating churches better than everyone else.

Cert. Pet. at 27a; 811 F.Supp. at 1141.

The School Board urges this Court to extend Establishment Clause doctrines prohibiting government financing of religion to situations in which the government gives nothing to churches, but in fact receives money from the churches. This Court should reject the School Board's invitation to hear this case on that point.

---

[3] The Church is not saying that the Establishment Clause requires the government to charge religious groups using an open forum a minimal fee that covers the government's costs. The constitutional requirement is equal treatment (see section II-B). A government entity could offer an open forum at no cost to religious groups if it offers it for free to all other groups.

B. There Is No Establishment Clause Violation When the Government Provides a Neutral Benefit to All.

This case does not present an Establishment Clause question about government subsidies to religion. At most, this case presents the question of whether a church can receive the "government benefit" of access to an open forum on the same conditions and terms as everyone else, without violating the Establishment Clause. This Court has upheld such plans in cases like *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), *Mueller v. Allen*, 463 U.S. 388 (1983), *Walz v. Tax Commission*, 397 U.S. 664 (1970) and last term's decision in *Zobrest v. Catalina Foothills School District*, 509 U.S. ___, 125 L.Ed.2d 1 (1993). In these cases, this Court said there is no Establishment Clause violation for religious groups to partake of a governmental benefit that is neutrally available to a broad array of the community.

In *Zobrest*, the Supreme Court restated the principle earlier stated in *Mueller* and *Witters*, and then cited *Widmar v. Vincent* as supporting that proposition:

> For if the Establishment Clause did bar religious groups from receiving general governmental benefits, then "a church could not be protected by the police and fire departments, or have its public sidewalks kept in repair." *Widmar v. Vincent*, 454 U.S. 263, 274-75 (1981) (internal quotation marks omitted). Given that a contrary rule would lead to such absurd results, *we have consistently held that government programs that neutrally provide benefits to a broad*

> *class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.* Nowhere have we stated this principle more clearly than in *Mueller v. Allen,* 463 U.S. 388 (1983) and *Witters v. Washington Department of Services for the Blind,* 474 U.S. 481 (1986) ...

Zobrest, 125 L.Ed.2d at 10 (emphasis added).

Therefore, the critical issue is how does the School Board treat other community groups that rent school facilities? Those groups pay the lower, noncommercial rate to rent the buildings. The School Board singles out churches to pay higher rent, based solely on the religious content of their speech.

The error in the School Board's Establishment Clause theory is that it focuses only on religious groups. Every group, secular or not, receives the same "benefit" that churches receive. The Boy Scouts, the Girl Scouts, the Azerbaijan Cultural Association, the Citizens for a Free Vietnam and other community groups also "save" money, because they don't have to rent private buildings or construct their own meeting halls. Every group meeting at the School Board's buildings get the same "benefit" because anyone can rent the school buildings. Any benefit received by the Church here is one easily available to a wide range of groups. There is no need to review the Fourth Circuit's opinion on this point because it complies with this Court's holdings in *Witters, Mueller, Walz* and *Zobrest*.

III.

SINCE *WIDMAR v. VINCENT*, THERE IS NO CONFLICT AMONG THE COURTS ON THESE EQUAL ACCESS ISSUES

The School Board attempts to paint a picture of conflict among the lower courts on the issues raised in this case by citing a number of attorney general opinions, statutes and state court decisions. This "conflict" is illusionary, and at best shows that many states are still not obeying this Court's clear commands on equal access announced in *Widmar, Mergens* and *Lamb's Chapel.*

This Court should not consider the attorney general's opinions, because they are not authoritative interpretations of state law. Justice Scalia, in his concurring opinion in *Crandon v. United States,* 494 U.S. 152 (1990), said that attorney general's opinions are advisory opinions that this Court does not grant deference to as authoritative administrative interpretations. *Crandon,* 494 U.S. at 177. More importantly, attorney general opinions are not court adjudications of constitutional issues.

Also, most of them were written before *Widmar v. Vincent. Widmar* so changed the area of equal access law, that any opinions written before *Widmar* are outdated if they do not conform with the principles announced in *Widmar.* The attorney general opinions written after *Widmar* show that attorney generals still widely refuse to obey what this Court has ruled in *Widmar, Mergens*, and *Lamb's Chapel.*

The same problem exists with the various state statutes cited by the School Board to show a conflict. First, they are state statutes, not court decisions deciding the First

Amendment issues surrounding equal access or the Establishment Clause. More accurately, these show state legislatures that refuse to obey this Court's rulings in *Widmar, Mergens*, and *Lamb's Chapel*.

This Court should deny certiorari in this case, but if granted, this Court should do so to rule once again that school districts and states cannot violate the First Amendment's principles allowing religious groups equal access to open forums on the same terms and conditions as all other groups. The attorney generals and state legislatures should not be allowed to defy the decisions of this Court.

Also, the School Board refers to a group of obsolete, pre-*Widmar* state court decisions to demonstrate a conflict among the lower courts. These cases are *Pratt v. Arizona Board of Regents,* 110 Ariz. 466, 520 P.2d 514 (1974), *O'Hara v. School Board of Sarasota County*, 432 So.2d 1356 (Fla.Dist.Ct.App. 1983), *Southside Estates Baptist Church v. Board of Trustees*, 115 So.2d 697 (Fla. 1959), *Nichols v. School Directors,* 93 Ill. 61 (1879), *Davis v. Boget*, 50 Iowa 15 (1878), *State ex rel. Gilbert v. Dilley,* 145 N.W. 999 (Neb. 1914) and *Resnick v. East Brunswick Tp. Bd. of Ed.*, 77 N.J. 88, 389 A.2d 944 (1978).

These cases do not create clashing interpretations requiring this Court's intervention to resolve. First, none of these cases ruled that school districts must charge religious groups more money for renting school facilities for a long period of time than non-religious groups. These decisions say in essence that school districts should ban long-term religious groups altogether because of Establishment Clause concerns. This clearly conflicts with *Widmar v. Vincent.*

Second, all but one of the cases were decided before

Widmar v. Vincent -- Pratt (1974), *Southside Estates* (1959), *Resnick* (1978), *Nichols* (1879), *Davis* (1878) and *Gilbert* (1914). The continued vitality of these decisions depends totally on their consistency with *Widmar*. Any conclusions in these state court decisions to prohibit religious groups from long term use of school facilities available to others cannot stand in the light of *Widmar,* which recognized equal access protection for a weekly worship service held for a number of years by a student group on a university campus. *Widmar* has so changed the legal landscape in the area of equal access law that it is inaccurate to refer to these pre-*Widmar* cases as somehow creating a conflict among the lower courts that this Court needs to resolve.

The only post-*Widmar* case (*O'Hara*) did not even mention *Widmar* and instead relied exclusively on the state constitution. 432 So.2d at 1358. In fact, many of those decisions relied on their state constitutions' establishment clauses to make the point that long term church use of a school would be unconstitutional. *Southside Estates,* 115 So.2d at 700; *O'Hara,* 432 So.2d at 1358 and *Pratt*, 520 P.2d at 515-517. The Supreme Court ruled in *Widmar* that the government cannot use state constitutional establishment clauses to trump the federal free speech rights of religious speakers and deny them access to open forums. 454 U.S. at 275-276.

Third, there was at least one pre-*Widmar* state supreme court decision that rejected the Establishment Clause position held by the other state courts -- *Keegan v. University of Delaware*, 349 A.2d 14 (Del. 1974). In a case that foreshadowed *Widmar,* the Delaware Supreme Court ruled that the University of Delaware could not prohibit a Roman Catholic priest from performing Mass for university students in the university-owned common areas of a student

apartment building. The Mass was to be performed on a weekly, long term basis. The Delaware Supreme Court said such religious use was permissible because other student groups were allowed to meet there.

The School Board also cites two federal cases in a misleading way to demonstrate further "conflict" with the Fourth Circuit's ruling in this case. On further examination, neither case conflicts with what the Fourth Circuit ruled.

In *Wallace v. Washoe County School District,* 701 F.Supp. 187 (D. Nev. 1988), the district court for Nevada refused to grant a preliminary injunction to a Baptist church that sought access to a school building to meet for its weekly worship services. But the School Board failed to mention that the district court later reversed itself in a subsequently published decision. The district court, on cross motions for summary judgment, granted the church a permanent injunction and allowed the church to meet weekly for worship services in the empty school building. *Wallace v. Washoe County School District,* 818 F.Supp. 1346 (D. Nev. 1991).

In *Gregoire v. Centennial School District,* 907 F.2d 1366 (3rd Cir. 1990), *cert. den.* 498 U.S. 899 (1990), the Third Circuit declared unconstitutional a school district policy that banned religious speech in its open forum. The Third Circuit based its opinion on this Court's decisions in *Widmar* and *Mergens.* In *Gregoire,* Campus Crusade for Christ, an evangelical Christian group, had sought permission to rent the facility for an illusionist's performance. There was no disparate rental rate for religious groups in *Gregoire,* because the policy at issue totally banned religious groups from meeting there. The Third Circuit struck down the entire policy. *Gregoire,* 907

F.2d at 1383. *Gregoire* is not a case in which the Third Circuit "upheld" a content-based rent structure against religious groups.

On the contrary, the Third Circuit interpreted *Widmar* consistently with other circuit courts to say that government entities cannot exclude religious speakers from forums open to a wide array of speakers. *See also Concerned Women for America v. Lafayette County and Oxford Public Library,* 883 F.2d 32 (5th Cir. 1989) (Mississippi public library cannot exclude women's prayer group from auditorium open forum) and *Grace Bible Fellowship v. Maine School Area District,* 941 F.2d 45 (1st Cir. 1991) (Maine school district cannot exclude church's evangelistic Christmas banquet from school open forum).

Therefore, there is no conflict on these important equal access issues for this Court to resolve. This Court should deny the request to review this case.

IV.

THE *CHEVRON OIL* DOCTRINE DOES NOT APPLY TO THIS CASE

Last term, in *Harper v. Virginia Department of Taxation*, 509 U.S. ___, 125 L.Ed.2d 74 (1993), this Court expressed dissatisfaction with the "prospective relief only" doctrine spelled out in *Chevron Oil v. Huson,* 407 U.S. 97 (1971). This Court specifically ruled in *Harper* that new rules of law must be given full retroactive effect in all civil cases if the new rule was applied to the parties in the case in which it was announced. While eliminating this "selective prospectivity" portion of the *Chevron Oil* doctrine, *Harper* left unresolved whether *Chevron Oil* still applied to cases of

"pure prospectivity." This Court may desire to address the continuing vitality of this remaining "pure prospectivity" wing of the *Chevron Oil* doctrine, however, this is not the case to accomplish that purpose for two reasons.

First, this case does not actually raise a *Chevron Oil* issue. The lower courts resolved the questions of law by a straightforward application of *Widmar*.

Second, the School Board is asking this Court to move in the opposite direction that it has indicated it wants to go with this doctrine. Specifically, the School Board wants this Court to resuscitate the *Chevron Oil* doctrine, when this Court has indicated that it wants to abandon it completely.

A. This Case Does Not Raise a *Chevron Oil* Issue.

The Fourth Circuit corrected the district court's erroneous application of *Chevron Oil's* "prospective relief only" doctrine to this case. Under this doctrine, courts may apply a decision prospectively only if the case presents a new principle of law or overrules clear past precedent. *Chevron Oil*, 404 U.S. at 106. The district court denied the Church's request for compensatory damages by invoking the *Chevron Oil* doctrine and saying that its ruling against the School Board was a novel application of law.

The Fourth Circuit ruled that the district court should not have invoked the *Chevron Oil* doctrine, because "the holding in *Widmar*, a 1981 decision, unremarkably controls the decision here and that the district court did not establish a new principle." Cert. Pet. at 13a; 17 F.3d at 710. This case simply does not present a *Chevron Oil* issue. Because the district court's opinion did not establish a new principle

of law, the Fourth Circuit said there was nothing in the case to trigger application of *Chevron Oil's* prospective relief doctrine. If this Court wants to revisit the *Chevron Oil* doctrine, this is not the case to do it, because that doctrine is not present here.

B. The School Board is Asking This Court to Move In the Opposite Direction of This Court's Jurisprudence.

The School Board is asking the Supreme Court to revive the *Chevron Oil* doctrine, when just last year in *Harper*, a majority of this Court indicated that the *Chevron Oil* doctrine should be totally discarded. For example, although *Harper* did not formally overrule *Chevron Oil,* Justice O'Connor said in her dissenting opinion that it in effect did. *Harper,* 125 L.Ed.2d at 98 and 99. Justice O'Connor's statement drew this response from Justice Scalia, who was in the majority:

> I am not arguing that we should "cast overboard our *entire* retroactivity doctrine with . . . [an] unceremonious heave-ho." . . . There is no need. We cast over the first half six Terms ago in *Griffith*, and deep-sixed most of the rest two Terms ago in *James B. Beam* . . . What little, if any, remains is teetering at the end of the plank and needs no more than a gentle nudge.

Harper, Scalia concurring, 125 L.Ed.2d at 94, n.2.

If this Court is looking for a case to overrule *Chevron Oil,* this is not the case because there is no new rule of law here. The lower courts simply applied clear principles from

Widmar to decide this case. The Fourth Circuit ruled that there was no *Chevron Oil* issue in this case, and that ruling does not need to be reviewed by this Court.

CONCLUSION

For the above-stated reasons, Fairfax Covenant Church urges this Court to deny the School Board's petition for a writ of certiorari.

Date: May 16, 1994

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1993

Fairfax County School Board,
Petitioner,

v.

Fairfax Covenant Church,
Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* OF NATIONAL SCHOOL BOARDS ASSOCIATION AND THE STATE OF CALIFORNIA IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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II. Widmar v. Vincent and Lamb's Chapel v. Center Moriches School District did not decide the issue of whether the concept of "equal access" includes permanent use by churches of public school facilities for religious services. Until this Court answers that question, school districts despite their best efforts to comply with the law will continue to be exposed to liability under either the free speech or establishment clauses.10

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BRIEF *AMICI CURIAE* OF NATIONAL SCHOOL BOARDS ASSOCIATION AND THE STATE OF CALIFORNIA IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

This brief is filed with consent of both parties. Stipulation of consent is on file with the Clerk of this Court.

INTEREST OF THE *AMICI*

***Amicus* National School Boards Association**

(NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands, the Territory of Guam and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents the nation's 95,000 school board members, who, in turn, govern 15,173 local school districts that serve more than 40 million public school students -- approximately 90 percent of all elementary and secondary students in the nation.

School boards across the country, most of which permit their facilities to be used by the public during non-school hours, are in dire need of this Court's guidance as to whether they may or must allow churches to conduct religious services on a permanent basis in the public schools, and on what terms.

Amicus **State of California** is a sovereign state with a specific interest in this case

because its statutory scheme allowing for religious use of school facilities is placed in issue by the decision of the Court of Appeals for the Fourth Circuit.

California permits religious use of school facilities for temporary periods, on a one-time or renewable basis, for entities that lack suitable facilities, at a cost equal to the school district's direct cost. California Educ. Code §§ 40041(b) and 40043(b) (The "Civic Center Act"). The use charge is more than what is charged civic groups, who may use school facilities for free, and less than the fair market value charged groups who solicit contributions and do not remit their receipts to purely charitable causes. No other restrictions on the religious use, specifically the types of expression, are governed by California's statute.

The California Attorney General concluded in 76 Ops. Cal. Atty. Gen. 52 (1993) that the Legislature's enactment of the Civic Center

Act established a designated public forum in public schools and no violation of the United States or California Constitutions arose if religious organizations lacking suitable housing were permitted equal access to such facilities because the benefit conferred on the religious organization was merely incidental to a primary public purpose.

Noting California's tiered approach in granting access to school facilities, the California Attorney General opined:

> [B]y charging for the direct cost of facility use, the state avoids any claim it is making an impermissible gift to religion. By limiting use to unhoused sects the government avoids permanent institutionalization of religious use within a given school facility. Such an occurrence might allow one to reasonably infer the state has placed its imprimatur on a particular religion.

Id. at 63.

Supreme Court guidance is desired by states like California which have enacted balanced statutory schemes in order to

preserve the integrity of both the Free Speech and Free Exercise Clauses of the First Amendment.

REASONS FOR GRANTING THE WRIT

The practice by school boards of limiting use of school facilities by churches for religious services on a permanent basis is widespread across the country because of the general belief by school boards and their lawyers, based on this Court's jurisprudence, that such permanent use would violate the Establishment Clause. Because this Court has not ruled on the issue, school boards are forced to make the untenable choice between violating the establishment clause, risking a lawsuit by churches under the free speech clause or closing the schools for use by the community.

ARGUMENT

The decision by the Court of Appeals for the Fourth Circuit is of sufficient national importance to warrant grant of *certiorari*.

The conflict between the free speech and establishment clauses relating to the use of public school facilities has caused excruciating controversy in the public schools over the past decade. Lawsuits such as that in the instant case are expensive, even in the absence of damages awards, and often are unavoidable because both sides to the debate raise constitutional claims. Where, as here, the issue has not been resolved by this Court, it is particularly difficult for school districts to decide which constitutional provision should prevail. When someone disagrees with the decision made by the schools and sues, the school districts have no choice but to litigate the issue.

I. Current state and federal law has led many school boards nationwide to a good faith determination that it is unconstitutional to allow a church to use school facilities for religious services on a permanent basis. This Court should provide guidance on this complex issue to avert the need for perpetual litigation and the unfair imposition of damages and attorneys' fees on schools in this situation.

The perception of the Fairfax County School Board that extended use of their schools for religious services raises serious establishment problems is not an unusual one. That perception is held by school boards and their attorneys across the land. School boards are counseled to carefully walk the line between assuring equal access to religious groups and stepping into establishment of religion quicksand.

The Petition for *Certiorari* includes in an appendix of citations to various authorities which limit the use of public school facilities by churches in twenty states. Since school boards are creatures of state law, they do not have discretion to use their facilities for purposes other than those designated by state legislatures, courts or attorneys' general.

School boards across the country operate under policies similar to that of the Fairfax County School Board. The National School

Boards Association operates a national clearinghouse of school board policies which includes policies from school boards in at least 30 states. All of the policies are similar in their treatment of religious use of facilities, for example: "in order to avoid the appearance that the school district may sponsor any particular religion and also to avoid the excessive entanglement of religion in the affairs of the school, it is deemed necessary to limit the amount of time that any one religious organization or group may use the facilities of the school for other than recreational purposes" (a suburban school district in Wisconsin); "the Board may rent school facilities to local, established churches during times of expansion or extensive repairs in the congregation's own facility" (a school district in Indiana). The use provided to Fairfax Covenant Church by Fairfax County is actually *more* extensive and accommodating than the use permitted in most

school districts.

It is unfair to school boards and to the taxpayers in their communities to require them to pay damages and attorneys' fees to plaintiffs because the board made a good faith mistake in deciding which clause of the first amendment should prevail in a particular case. The dilemma presented here is unlike the usual situation where the legality of a policy or practice is unclear, and the policymaker can simply wait until the courts rule. Here, if the board decides to allow churches to use school facilities on a permanent basis for religious services, and a court rules that the board violated the establishment clause, the board pays damages and attorneys' fees to the taxpayer plaintiffs. If the board decides to preclude such use, and a court rules that the board violated the free speech rights of the church, the board pays damages and attorneys' fees to the church.

Which constitutional principle is held to

be primary sometimes seems to depend on who is suing. If the plaintiffs complain that their free speech rights are trammeled, courts hold that equal access controls and the establishment clause is not implicated. *Lamb's Chapel v. Center Moriches*, 113 S.Ct. 2141 (1993). If it is a taxpayer suit or a nonadherent who sues under the establishment clause, the courts overturn school district accommodation of religion as an unconstitutional establishment. *See, e.g., Aguilar v. Felton*, 473 U.S, 402 (1985), *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985). The only consistency in these cases is that the school district loses.

II. *Widmar v. Vincent* and *Lamb's Chapel v. Center Moriches School District* did not decide the issue of whether the concept of "equal access" includes permanent use by churches of public school facilities for religious services. Until this Court answers that question, school districts despite their best efforts to comply with the law will continue to be exposed to liability under either the free speech or establishment clauses.

The lower court's decision dwelled almost

in its entirety on the "limited open forum" question; had the case involved a student religious group as in *Widmar v. Vincent*, 454 U.S. 263 (1981), or the showing by an adult religious group of a film as in *Lamb's Chapel v. Center Moriches School District*, *supra*, the lower court would certainly have been correct in stating that its decision "was readily foreseeable in light of *Widmar*." But Respondent's use of school facilities in this case is unlike the uses in either *Widmar* or *Lamb's Chapel*. Respondent does more than merely gather together a group of persons on school premises for religious discussion or to convey a religious viewpoint on a particular subject. Respondent, in effect, converts the school into a church by using numerous classrooms and the auditorium every Sunday until it decides to move.

During oral argument in *Lamb's Chapel*, Justice Souter asked Jay Sekulow, attorney for Lamb's Chapel, whether schools could be used

"to celebrate a mass or a baptism, or something like that," and shortly thereafter Chief Justice Rehnquist counseled Sekulow: "You don't have to defend some of these rather extreme hypotheticals to win your case." "*A Sticky Day for School and Religion*," Denniston, L. *The American Lawyer*, June, 1993, p. 85. But the holding of regular religious services on a permanent basis on school premises is no longer an "extreme hypothetical" because the Fourth Circuit now says such activities can be conducted by a church under the mantel of the free speech clause. However, this Court expressly noted in *Lamb's Chapel* that its decision did not relate to the question of use of facilities for religious services. 113 S.Ct. at 2144 n. 2.

Similarly, the *Widmar* decision did not reach this issue. Justice White apparently did not interpret the majority opinion as deciding that issue.

> I know of no precedent holding that simply because a public forum is open to all kinds of speech--including speech about religion--it must be open to regular religious worship services as well. I doubt that the State need stand by and allow its public forum to become a church for any religious sect that chooses to stand on its right of access to that forum.

454 U.S. at 287 n. 5 (White, J. dissenting).

Justice Powell, writing for the majority in *Widmar* and perhaps in response to Justice White's statement above, stated:

> Neither do we reach the questions that would arise if state accommodation of free exercise and free speech rights should in a particular case, conflict with the prohibitions of the Establishment Clause.

454 U.S. at 273 n. 13. Thus, contrary to the opinion of the court of appeals in this case, the existence of a designated public forum only begins the inquiry as to whether such a policy unconstitutionally advances religion.

Reasonable minds may differ on whether the long term or permanent use of school

facilities for religious services at less than a market rental rate establishes religion (although *amici* have been unable to locate any judicial support for such a practice), but few would contend as the Fourth Circuit did, that *Widmar* "unremarkably controls" the decision. College Bible clubs and educational films on family life cannot under any reasonable interpretation be compared with the perpetual use by a church of a school for weekly religious worship by 800 people, involving use of the school auditorium, 14 classrooms, an auxiliary gymnasium and the parking lot. Pet. App. 45a. Even some proponents of increased use of school facilities for religious purposes agree that this Court has not yet addressed the question of whether allowing religious services in a limited open forum raises establishment problems. For example, a discussion about *Lamb's Chapel* in the September/October, 1993 issue of *Church Law & Tax Report*, published by Christian

Ministry Resources, points out:

> *Note that this was a very narrow ruling.* The Court did not address the issue of whether or not public high school officials who establish a limited public forum can totally exclude religious activities that do not relate directly to the permitted uses of the property. For example, in this case did the church have a legal right to use the school facilities for an evangelistic crusade, or for religious services? These activities obviously would not have related to any permitted use. And yet by opening their facilities to some community groups must school officials make them available to a church for religious services? The Court did not answer this question.

The decision in *Widmar* was even narrower than *Lamb's Chapel* because the forum was limited to student groups, so the Court had no reason to consider the effect of its decision on the question of whether use of the facilities for religious services by churches on a regular basis would pass constitutional muster.

This Court may ultimately decide that there is no legal distinction between use of a public school building on a permanent basis

for religious worship and the type of use in *Widmar* and *Lamb's Chapel*. But it is totally unfair to require school districts to make this giant analytical leap at their peril.

III. The facts in this case clearly illustrate the precarious balancing of first amendment principles in which schools are forced to engage without a guiding hand from this Court.

There is a constitutional continuum between accommodation of religion and establishment of religion. The court of appeals apparently believes that once the school district opens its schools for use by the community, it must accommodate the church by allowing equal access without regard to the establishment clause. Perhaps that is correct, perhaps not. But this Court has never ruled on the question.

Widmar v. Vincent and *Lamb's Chapel* present facts on one end of the continuum where the forum is used for religious speech by students and community groups. The facts in this case present a clear example of the

issue at the other end of the continuum where the church is, in effect, asking that the school be converted into a church on Sundays in perpetuity. The facts in this case present an excellent opportunity for this Court to decide if the establishment clause limits in *any* way, the right to equal access. The court of appeals said "no" and school districts across the land need to know if this is correct.

IV. The court of appeals has imposed a new standard of proof unrecognized by this Court's establishment clause analysis. None of this Court's establishment of religion cases has required a *factual showing* that a state practice or policy is "perceived" by the public as establishing religion. The new standard makes it impossible for school districts to walk the tightrope between free speech and establishment of religion.

There is evidence in the record to show serious community concern and voiced complaints about the use of the school for church services and the appearance that the school system was supporting religion. *See* Pet. App. 25, 51a. But the court of appeals

erred in requiring Petitioner to make a factual showing of public perception of establishment in order to justify its policy of charging market rent to long-term church users. It is difficult enough for school districts to develop policies in this area without also being required to make a factual record supporting the policy in advance of its adoption.

The lower court correctly points out there has been a substantial amount of criticism of this Court's establishment of religion jurisprudence by members of this Court and commentators; nevertheless, those cases remain the law of the land. *Lamb's Chapel v. Center Moriches School Dist.*, 113 S.Ct. at 2148 n. 7. None of this Court's cases holding governmental action unconstitutional under the establishment clause has required *proof* of community perception that the practice endorsed or embraced religion. Justice White dissented in

a number of those cases precisely on the ground that there were no facts in the record to show that the government's action had the effect of advancing religion.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), Justice White faulted the majority for its refusal to trust private school teachers to uphold their pledge to teach only secular matter and, instead, holding the statute unconstitutional because it required a school district either to risk the unconstitutional "effect" of publicly funded private school teachers slipping religious teachings into secular courses or to "entangle" government with religion through efforts to monitor the teachers.

In *Levitt v. PEARL*, 413 U.S. 472 (1973), this Court held unconstitutional a statute reimbursing private schools for their teachers' time in preparing and grading tests. The ruling was based on the fact that teacher-prepared tests were *capable* of including

religious material despite the absence of any facts on the record to show that any test ever actually included religious material.

In *Aguilar v. Felton*, 473 U.S. 402 (1985), this Court overturned public funding of public school teacher instruction in private schools on the ground that the monitoring system to assure that the teachers do not inculcate religion would result in excessive "entanglement" with religion. Both Justice O'Connor and then Justice Rehnquist pointed out in their separate dissents that nothing in the record supported a conclusion that public school teachers would proselytize the students. But the majority opinion did not require such a showing.

In his concurrence in *Lamb's Chapel*, Justice Scalia indicated that he could not join in the majority opinion's statement that the use in question "would not signal endorsement of religion in general." Justice Scalia would hold that the use did not violate

the Establishment Clause because granting nondiscriminatory access to Lamb's Chapel "does not signify state or local embrace of a particular religious sect." Nothing in the opinion indicated, however, that the Court requires a factual finding before holding that a policy or practice is unconstitutional. Not only did the Fourth Circuit's opinion fail to address Justice Scalia's concern regarding particular religious sects; it required *evidence* that the community interpreted the use by the church as endorsement of religion.

The lower court discussion of whether there were facts to support a contention that the church "dominates the forum" is misplaced. That inquiry is only relevant where there is a finding that the policy on it face is constitutional. In *Widmar* this Court held that granting equal access to a religious club in a limited open forum does not establish religion, *unless* the use by religious clubs becomes so extensive as to "dominate the

forum." In other words, a policy of allowing equal access to student clubs, including student religious clubs, does not *on its face* violate the Constitution although *as implemented* it may be shown to establish religion. The lower court's discussion of the domination of the forum issue is misplaced here because the court failed to answer the first question *i.e.* whether a policy which allows a church to use the facility for religious services every Sunday on a permanent basis is unconstitutional on its face because of the message sent to the public that the government is embracing a particular religion.

In *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), the majority held unconstitutional a Christmas display in the county courthouse.

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principles remain the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on

> questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly* [citations omitted.]

492 U.S. at 593-94.

There was no proof in *Allegheny* that the community perceived that the town was endorsing Christianity by including a creche in the courthouse. No polls were conducted. No witnesses were called. The issue in *Allegheny* which was answered in the affirmative, was whether the display of the creche "conveys a message to nonadherents of Christianity that they are not full members of the political community and a corresponding message to Christians that they are favored members of the political community." 492 U.S. at 628 (O'Connor, J. concurring). The Court did not require proof that the message was received, only that it was sent.

The court of appeals in the instant case, however, required the Fairfax school board to

prove the effect of the permanent use of the school by Fairfax Covenant on the members of the community. The only way to meet that burden is to allow the church services year after year until sufficient empirical evidence of a perception of endorsement is gathered. Meanwhile, the district may end up in court defending its practice against a claim that it is establishing religion.

V. The only "safe" alternative open to school districts is to close their schools to outside use, thus precluding many communities from access to any suitable buildings for community use.

Most, if not all, school districts open their buildings for use by the public when not otherwise in use for school purposes. In many smaller communities the public school may be the only building suitable for meetings, sporting events and other activities.

As pointed out in the Petition herein, school districts in 20 states are prohibited by state law or state attorney general directive from allowing churches to use school

facilities on a permanent or continuing basis for religious worship. Whether these statutes are constitutional or the attorneys' general opinions are correct begs the question. Only this Court can decide who is correct and, in the absence of that decision, school boards must rely on the best legal advice they can obtain.

The only alternative to placing themselves between the constitutional Scylla and Charybdis is to close down the schools to after hours use. That may be a legal option, but as a practical matter, it is no option at all. Were the public schools to be closed for use by the community during non-school hours, members of the communities would rightfully rise up in anger at such miserly use of public property.

At the same time that school districts throughout the country are suffering losses of revenue, the educational and social needs of public school students are on the increase.

It would be unfortunate to subject these districts to the award of significant retroactive damages because of their good faith attempt to comply with the U.S. Constitution, without the endorsement of that result by the highest court in the land. Litigation costs and large damage awards (Fairfax County could be subject to as much as $1,157,000 in damages, Pet. App. 29, 57a) would be an enormous burden on any school district, but most of the school districts in this country are small and rural (Nebraska, for example has recently consolidated into nearly 1000 school districts) and a retroactive award like the one in this case could bankrupt them.

CONCLUSION

For the reasons stated above, *Amici* urge

this Court to grant the petition for *certiorari*.

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